No. 89-7743

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THADDEUS DONALD EDMONSON,
Petitioner

v.

LEESVILLE CONCRETE COMPANY, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 30, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

124 pp

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10-19-84	COMPLAINT
04-09-85	ANSWER to Complaint
06-26-87	PT STMT
07-27-87	Motion by Defendant filed to quash the taking of depositions
07-27-87 to 08-05-87	Jury Trial
09-28-87	JUDGMENT—together w/legal interest from date of judicial demand
10-29-87	NOTICE OF APPEAL filed

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. CV84-2871

THADDEUS DONALD EDMONSON,

vs.

LEESVILLE CONCRETE COMPANY, INC.

COMPLAINT FOR DAMAGES

The Complaint of THADDEUS DONALD EDMONSON, a citizen of the State of Louisiana, with respect represents:

1.

Jurisdiction is founded upon the occurrence of the subject accident on an area within the confines of Fort Polk, a Federal area or enclave, based on jurisdiction under Title 28 USCA Sec. 1331 and on the grounds that every United States District Court is a Court of general original jurisdiction in respect to cases and controversies arising within federal areas or federal reservations that are geographically located within the district for which the Court sits.

2.

Defendant in this case is the LEESVILLE CONCRETE COMPANY, INC., a domestic corporation, authorized to do and doing business in the State of Louisiana, who can be served through its registered agent for service of process, R. B. Sewell or Geneva Sewell, South Texas Street, DeRidder, Louisiana.

3.

Defendant, LEESVILLE CONCRETE COMPANY, INC., is justly and truly indebted onto the complainant, THADDEUS DONALD EDMONSON, in the full and true sum of FOUR HUNDRED TWENTY THOUSAND and NO/100 ($420,000.00) DOLLARS, together with legal interest thereon from the date of judicial demand until paid and for all costs of these proceedings for the reasons set out below:

4.

That on June 18, 1984, complainant was injured while working as an employee of Tanner Heavy Equipment Company, Inc. at a location on a job site at Fort Polk, Vernon, Louisiana. Complainant was assisting with the filling of a hopper or curb machine with concrete which required that complainant guide the concrete chute from defendant's vehicle to the hopper.

5.

At the time of the accident on June 18, 1984 at approximately 7:00 P.M., the defendant's concrete truck had completed loading the hopper and was in the process of pulling forward when the operator of the truck, an employee of defendant, permitted the concrete truck to roll backwards toward complainant, pinning complainant between the rear bumper of the truck and the chute on the hopper or curb machine.

6.

The accident described herein was the sole result of the carelessness and negligence of the defendant, through its employee, in permitting the concrete truck owned by defendant to roll backwards pinning the complainant between the rear bumper of the truck and the chute on the hopper or curb machine.

7.

Complainant avers that defendant, through the conduct of its employee, was negligent and at fault in the following non-exclusive list of particulars, among others which may be shown at the trial hereof, to-wit:

(a) Careless and negligent operation of its vehicle;

(b) Failure to properly maintain its vehicle;

(c) Failing to maintain control of its vehicle;

(d) Failing to assure that its vehicle would not roll backwards causing injury to complainant.

8.

Complainant, THADDEUS DONALD EDMONSON, itemizes the damages for which he has sustained and is entitled to recover as follows:

(a) Medical expenses, past, present and future	$ 20,000.00
(b) Pain and suffering, past, present and future	$100,000.00
(c) Disability and loss of income and impairment of earning capacity	$200,000.00
(d) Mental anguish, past, present and future	$100,000.00

Defendant herein is liable onto complainant in the full and true sum of FOUR HUNDRED TWENTY THOUSAND and NO/100 ($420,000.00) DOLLARS.

9.

Complainant desires a trial by jury on all issues raised herein and hereby expressly reserves the right to amend the Complaint in accordance with the law.

WHEREFORE, complainant prays for service and citation upon defendant herein and further prays that after expiration of all legal delays and other due pro-

ceedings had, that there be judgment entered herein in favor of complainant, THADDEUS DONALD EDMONSON, and against defendant, LEESVILLE CONCRETE COMPANY, INC., in the full and true sum of FOUR HUNDRED TWENTY THOUSAND AND NO/100 ($420,000.00) DOLLARS together with legal interest thereon from date of judicial demand until paid, and for all costs of these proceedings.

Complainant further prays for a trial by jury on all issues raised herein.

Respectfully submitted,

WOODLEY, BARNETT, COX,
WILLIAMS, FENET & PALMER

/s/ James E. Williams
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

[Title Omitted in Printing]

ANSWER

NOW INTO COURT, through undersigned counsel, comes LEESVILLE CONCRETE COMPANY, INC., named defendant in the above numbered and entitled cause, and for answer to the complaint of the plaintiff with respect shows the Court that:

I.

FIRST DEFENSE

1.

The petition or complaint fails to state a cause of action upon which relief may be granted.

II.

SECOND DEFENSE

In response to the specific allegations of the complaint, defendant shows:

1.

The allegations of Paragraph 1 are denied.

2.

The allegations of Paragraph 2 are admitted.

3.

The allegations of Paragraph 3 are denied.

4.

The allegations of Paragraph 4 are denied.

5.

The allegations of Paragraph 5 are denied as written.

6.

The allegations of Paragraph 6 are denied.

7.

The allegations of Paragraph 7 are denied.

8.

The allegations of Paragraph 8 are denied.

9.

The allegations of Paragraph 9 are admitted.

III.

THIRD DEFENSE

1.

In the alternative, and only in the event this Honorable Court should find any fault or negligence on the part of defendant or its employees which is denied, defendant shows that plaintiff was guilty of assumption of the risk which bars his recovery herein.

IV.

FOURTH DEFENSE

1.

In the further alternative, and only in the event this Honorable Court should find that defendant was guilty of any fault or negligence, which is denied, defendant shows that plaintiff was guilty of contributory negligence which

would serve to reduce the amount of any award by the percentage of his contributory negligence or fault.

WHEREFORE, defendant, LEESVILLE CONCRETE COMPANY, INC., prays that after due proceedings are had and trial hereof, there be judgment herein in favor of defendant and against plaintiff, rejecting plaintiff's demands at his cost;

Further prays for trial by jury of all issues herein.

Respectfully submitted,

TRIMBLE, PERCY, SMITH, WILSON,
FOOTE, WALKER & HONEYCUTT

/s/ James T. Trimble
JAMES T. TRIMBLE, JR.
P. O. Box 1950
Alexandria, Louisiana 71309

Attorneys for Defendants

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

[Title Omitted in Printing]

PRE-TRIAL STATEMENT

Counsel for plaintiff, Thaddeus Donald Edmonson, submits the following pre-trial statement to the court and opposing counsel:

1. *Jurisdiction*

Jurisdiction in this case is founded upon the occurrence of the subject accident on an area within the confines of Fort Polk, a federal area or enclave, based on jurisdiction under Title 28 USCA, Section 1331, and on the grounds that under the U.S. Constitution, Article 1, Section 8, Clause 17, every U.S. District Court has exclusive jurisdiction in respect to cases and controversies arising within federal areas or federal reservations that are geographically located within the district for which the court sits.

2. *Additional Pleadings*

None.

3. *Pending Motions*

None.

4. *Brief Summary of the Case*

After being honorably discharged from the Army, Thaddeus Donald Edmonson began temporary work as a laborer for Tanner Heavy Equipment. This accident occurred after only two weeks on the job. On June 18, 1984, while working at a job site at Fort Polk, Vernon,

Louisiana, Mr. Edmonson was assisting with the operation of a curb machine, necessitating his position between defendant's concrete truck and the curb machine. As defendant's truck was in the process of pulling forward, the truck was permitted to roll backwards, suddenly pinning Edmonson between the rear bumper of the truck and the curb machine.

As a result of this accident, Edmonson sustained serious back and neck injuries that have necessitated substantial medical expenses.

5. *Issues of Fact*

The principal issues of fact involving the plaintiff, Thaddeus Donald Edmonson, are the following:

(a) Factual issues concerning the occurrence of the accident;

(b) Factual issues concerning plaintiff's injuries and their relationship to this accident.

(c) Factual issues concerning damages, including medical expenses, lost wages and general damages;

(d) Factual issues concerning physical and mental condition before and after the accident.

6. *Issues of Law*

(a) Legal Responsibility of Leesville Concrete Company for actions or omissions;

(b) Entitlement of complainant, including damages, special damages and legal interest.

7. *List of Witnesses*

Will Call:

(a) Fred Bolgiano, on cross-examination;

(b) William D. Sines;

(c) Eugene Brickhouse, videotape deposition;

(d) Bruce E. Razza, M.D., videotape deposition;

(e) Charles O. Bettinger, III, Ph.D.;

(f) William Krooss, M.D., videotape deposition;

(g) Mrs. Crystal Edmonson;

(h) Charles Schiber, M.S., videotape deposition;

(i) Dr. Clark Gunderson;

(j) Gillis Morin, M.D.;

(k) Rick Tanner.

May Call:

(a) Gary M. Woodard;

(b) Mark A. Stevens;

(d) Bennie Ash

(e) Earl Ray Connelly;

(f) Kenneth Gordon;

(g) Dan Elliott

(h) Gary Wright, on cross-examination;

(i) Rick Johnson, on cross-examination;

(j) James Massey, on cross-examination.

7. *Exhibits*

(a) Military records and Army Yearbook;

(b) Tax information and earnings records;

(c) Medical records and bills;

(d) Notice of cancellation of insurance;

(e) Military awards;

(f) Safety manual;

(g) Photographs;

(h) Receipts for travel expenses;

(i) Arrest and conviction records of Fred Bolgiano;

(j) Military Investigation of Accident;

(k) Emergency Room Record;

(l) Deposition by written questions to Physicians and Hospitals;

(m) Hospital Records;

(n) Receipts for Discovery matters for costs;

(o) Military Police Report;

(p) Certificate that Fort Polk is within the State of Louisiana.

8. *Depositions*

Deposition of any party taken if he is not in attendance at the trial of the case; depositions by written questions.

9. *Stipulations*

None have been presented.

10. *Probable Length of Trial*

Four to five days.

Date: June 25 '87

Respectfully submitted,

WOODLEY, BARNETT, WILLIAMS,
FENET, PALMER & PITRE

/s/ James E. Williams
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Post Office Drawer EE
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[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted in Printing)

PORTION OF PROCEEDINGS
HAD BEFORE THE HONORABLE EARL E. VERON,
UNITED STATES DISTRICT JUDGE, AND A JURY,
AT LAKE CHARLES, LOUISIANA, BEGINNING
ON THE 27TH DAY OF JULY, 1987.

* * * *

THE COURT: Good morning, ladies and gentlemen. All right. Let me apologize to you for coming in a little late. We were taking care of business. That is still no reason why we shouldn't have been here. And we are going to try to make it up to you. Now, we are going to be trying one case, and one case only. If you are not picked as a juror in that case, you will be free to go home. Additionally, if you are picked as a juror in this case, we are not going to keep you overnight. You can go home for lunch. I will tell you when to go home this evening, and tell you when to come back tomorrow and so forth and so on. The only time you will be required to stay here, other than when court is in session, is when the case is given to you. Now, Mrs. Benoit, would you swear all the prospective jurors?

(Whereupon all prospective jurors were duly sworn on voir dire.)

THE COURT: All right. Now, ladies and gentlemen, I will now state to you the statutory requirements that you must have in order to serve as a juror. At the conclusion, if you lack any one or more or these qualifications, I then ask you to raise your hand. You must be a citizen

of the United States, and you must have resided in the Lake Charles Division of the United States District Court, for the Western District of Louisiana, for the preceding twelve months. The Lake Charles Division comprises the following parishes, Calcasieu, Cameron, Jefferson Davis, Beauregard, Allen and Vernon. If you have lived in that six parish geographical area, although you may have moved from one parish to another, you would be qualified. You must be eighteen years of age or older, and you must be able to read, write and speak the English language. You must not be incapable of serving as a juror because of a mental or physical infirmity. Now, let me explain those to you. By mental infirmity we could mean, for example, that you have a nervous condition, that if you were sitting in the jury box, you couldn't give this case your undivided attention. A physical infirmity could be one where you have a hearing problem. If you can't hear all the evidence, it logically follows that you would not be able to render a fair decision. And the last thing, you must not have a charge pending against you, or have been convicted of a crime punishable by imprisonment for more than one year, and your civil rights have not be restored. Now, those are the statutory qualifications. Do any of you lack any one or more of these qualifications? If you do, please raise your hand. Seeing no hands, I will assume that you are all qualified at this point. Now, Mr. Chaddick, would you now draw eighteen names, please.

And, Mr. Alexander, starting putting them on the back row seats. Fill up the back and front, and we will put the rest on the seats inside the rail.

THE MARSHAL: As I call your name, come forward and have a seat. Number 41, Rodney Gaspard. Number 2, Ron Bradley. Number sixteen, Ara Eloi.

MS. ELOI: Eloi.

THE COURT: How is that spelled, ma'am?

MS. ELOI: E-l-o-i.

THE COURT: And it is pronounced how?

MS. ELOI: Eloi.

THE COURT: Eloi. All right, Thank you, ma'am.

THE MARSHAL: Number twenty, Gladys Hansbrough. Number three, Willie Combs. Number twelve, Wilton Simmons. Number fifteen, Robert Dougherty. Number Twenty-eight, Lawrence Paniuski. Number twenty-three, Nikki Fruge. Number Twenty-seven, Charles Williams. Number Thirty-seven, Eloise McBride. Number six, Phillip Soileau. Number five, Wavelle Dugas. Number nine, Roberta Yellott. Number eighteen, Ray Smith. Number forty-three, James Albarado. Number twenty-nine, John White. Number thirty-two, John Askew. That's eighteen, Your Honor.

THE COURT: All right. Ladies and gentlemen, the case you will be hearing is the case of Thaddeus Donald Edmonson versus Leesville Concrete Company, Incorporated. And by the way, let me explain to you, because I have found out that some people don't understand who the plaintiff and who the defendants are. So I am going to tell you. The plaintiff is the person bringing the lawsuit. So Mr. Edmonson is the plaintiff. Now, Mr. Edmonson, would you stand and face the jury please? All Right. Thank you, sir. You may be seated. Mr. Edmonson has alleged that on or about June 18, 1984, that while involved with a concrete truck that had been completed unloading, he was injured as a result of the concrete truck rolling backwards. And as a result of it, he is contending that he has suffered the injuries which is the subject of this lawsuit. Now, at this time I will ask, do any of you know Mr. Thaddeus Donald Edmonson, the plaintiff in this case? Now, representing Mr. Edmonson is Mr. James Doyle. Would you stand, please?

MR. DOYLE: Yes, sir.

THE COURT: Also representing Mr. Edmonson is Mr. Joe Morgan, Jr. Now, first of all, I ask do any of you know Mr. James Doyle? All right, Mrs. Yellott.

JUROR YELLOTT: Yes, sir.

THE COURT: How do you know him?

JUROR YELLOTT: He attended our church for sometime.

THE COURT: All right. Would you be seated, gentlemen. He attended your church for sometime?

JUROR YELLOTT: Yes, sir.

THE COURT: Does he still attend your church?

JUROR YELLOT: I don't think so. I haven't seen him in a while.

THE COURT: All right. Well, maybe he is going to another one, and that is probably why you are not seeing him. He may be going to the same denomination, but a different church. But what we are concerned with, and I want all of the jurors to understand that what the court is looking for, and what the attorneys and parties are looking for, is a jury that will listen to the evidence, determine the facts from the evidence and render a fair and impartial decision. And that is the purpose of these questions, to find out if there is something that would lead us to believe, or them to believe that maybe something would happen. Now, did you socialize with Mr. Doyle and his family, ma'am?

JUROR YELLOTT: No. sir.

THE COURT: All right. Well, I am just going to go straight to the direct question. Would the fact that he attended the same church you attended, would that, in anyway, influence your decision in this case?

JUROR YELLOTT: No.

THE COURT: See, what I am thinking about now is that if you are selected and sworn as a juror, and you get in the jury lounge area, instead of discussing the evidence, in the back of your mind, you say, well, you know, Mr. Doyle went to my church. He is a real nice fellow. And by the way, he is. I wouldn't want that to influence your decision, in anyway. On the other hand, from that fact that he attended your church, maybe you concluded maybe he is not such a nice fellow, and on the other hand, I wouldn't want you to conclude, well, I don't like him, therefore I am not going to be fair to the plaintiff.

Do you understand my question? And can you tell this court, under oath, that if you are selected and sworn as a juror, you can render a fair and impartial decision?

JUROR YELLOTT: Yes, sir.

THE COURT: Anyone else know Mr. Doyle? How about Mr. Morgan? Thank you, Mr. Morgan. All right. Now, Mr. Doyle, I am going to just ask you to name off, or read off the list of your partners and associates, and ask the jurors to listen to those names.

MR. DOYLE: Yes, sir.

THE COURT: And then I want to ask you if you know any of them.

MR. DOYLE: Judge, my partners are Edmond E. Woodley, Edgar F. Barnett, James E. Williams, Robert W. Fenet, Paul E. Palmer, Earl G. Pitre, or Pitre, some people call him Pitre, Clayton A. L. Davis, Rick J. Norman, and our associates are Henry E. Yoes, known as Gene Yoes, Kathleen Kay and Mr. Morgan here.

THE COURT: Do any of you know any of these other names? All right. Again, Ms. Yellott.

JUROR YELLOTT: Mr. Fenet. His children and my children go to school together, and are good friends.

THE COURT: All right. Would the fact, would that influence you, in anyway?

JUROR YELLOTT: No.

THE COURT: Or would you do what I said you should do?

JUROR YELLOTT: Would do what I should do? Yes, sir.

THE COURT: In other words, simply discuss the evidence and determine the facts from the evidence and take the law as I give it to you and render a verdict?

JUROR YELLOTT: Yes, sir.

THE COURT: All right. Let's see. Mr. Askew.

JUROR ASKEW: Yes, sir. I know Mr. Fenet fairly well, socially, he and his family.

THE COURT: Well, the fact that you know Mr. Fenet socially, would that influence your decision in this case?

JUROR ASKEW: No, sir.

THE COURT: If it would, tell us now.

JUROR ASKEW: No, sir, it won't.

THE COURT: All right. I believe you, sir. Anyone else know any of these gentlemen. All right. All right, Mr. Gaspard.

JUROR GASPARD: Woodley, Ed Woodley.

THE COURT: You know Mr. Woodley?

JUROR GASPARD: Yes, sir.

THE COURT: I am sure you have run across him socially.

JUROR GASPARD: Yes. And Fenet.

THE COURT: Yes. Would the fact that you have run across them socially, would that influence you, in anyway?

JUROR GASPARD: No.

THE COURT: Thank you. The reason why we are asking these questions is because after the case is over, if you ran across one of the attorneys—

(Note: At which point fire alarm sounded.)

THE COURT: All right. Back on the record, Mr. Williams, now. All right. Now, as I was telling you, ladies and gentlemen, the purpose of these questions is that, for example, after the case is over, if you happen to meet with one of these lawyers, would you be embarrassed because of running into them because of your verdict. That is what we are really after. So if it would create a situation where you would be embarrassed in running across, for example, Mr. Gaspard, if you ran across Mr. Fenet or Mr. Woodley later on, would you feel like, well, you know, his law firm represented that fellow, and I am kind of embarrassed about it. That is what we are talking about. And I know you are telling me that that won't affect you. All right. Now, representing the defendant

in this case, Leesville Concrete Company, is Mr. John Honeycutt. And let me ask this, ladies and gentlemen. Do any of you know Mr. Honeycutt? All right. Mr. Honeycutt, would you name off your partners and associates, sir?

MR. HONEYCUTT: My partners are Mr. J. Michael Percy, Mr. David P. Smith, Ms. Elizabeth E. Foote and, of course, myself. Our associates are Steven Graalman and Gary Nunn and Arron Moriarty.

THE COURT: All right. Do any of you know any of those people that he has mentioned? Now, the young lady sitting there, who is she?

MR. HONEYCUTT: This is Sandra Smith. She is a paralegal with our firm.

THE COURT: All right.

MR. HONEYCUTT: I might add, Judge, that our firm is located in Alexandria.

THE COURT: All right. Fine. Now, that we have explained what the case is about, and the parties involved, let me ask you a few more questions. Have any of you ever served on a jury before? Okay. Start with Mr. Gaspard. Was it civil or criminal? Do you recall?

JUROR GASPARD: Civil.

THE COURT: And where was it, state or federal court?

JUROR GASPARD: I would say state.

THE COURT: Yeah. Down the street?

JUROR GASPARD: Yeah.

THE COURT: And do you remember how it came out? If you do, it is fine; if you don't, fine.

JUROR GASPARD: It's been a long time ago.

THE COURT: All right. Mr. Bradley?

JUROR BRADLEY: Yes, sir. Civil.

THE COURT: And where, sir?

JUROR BRADLEY: It was here, federal.

THE COURT: Do you remember how it came out?

JUROR BRADLEY: A little bit.

THE COURT: Did the jury bring a verdict for the plaintiff or the defendant, or do you recall?

JUROR BRADLEY: Plaintiff.

THE COURT: Okay. Ms. Eloi, did you raise your hand?

JUROR ELOI: No.

THE COURT: All right. Who else on the back row? All right. Let's get to the front row then. All right, Mr. Paniuski?

JUROR PANIUSKI: Your Honor, I don't remember. It was a few months ago here in federal.

THE COURT: Was it me or Judge Hunter?

JUROR PANIUSKI: It was you.

THE COURT: What kind of case was it? Do you remember?

JUROR PANIUSKI: Assault and battery, I believe it was. We had a civil case. It was the Coushatta Reservation.

THE COURT: Oh, yes. That was a criminal case.

JUROR PANIUSKI: Criminal, yeah. With a weapon.

THE COURT: And you all found him what? Guilty?

JUROR PANIUSKI: Guilty

THE COURT: That's right. I remember now. All right. Let's see. Mr. Williams, did you raise your hand? I mean Ms. McBride, you raised your hand?

JUROR McBRIDE: Yes Here, last year. But it was settled out of court. We were dismissed.

THE COURT: So you didn't get to render a verdict?

JUROR McBRIDE: Right.

THE COURT: Mr. Soileau?

JUROR SOILEAU: I have been on four juries.

THE COURT: All right.

JUROR SOILEAU: Criminal and civil. But only one went to, we actually deliberated. And that was a criminal. And we ended up in a hung jury.

THE COURT: All right.

JUROR SOILEAU: So I haven't settled anybody anything.

THE COURT: What kind of case was it?

JUROR SOILEAU: One was—

THE COURT: No. The one you hung up.

JUROR SOILEAU: We deliberated, was on a drug case, undercover work.

THE COURT: Okay. Anybody else on the front row? All right, Mr. Dugas?

JUROR DUGAS: It was a civil case. And it ended for the defendant.

THE COURT: Was it here or in state court?

JUROR DUGAS: Here in district.

THE COURT: How long ago? Do you remember?

JUROR DUGAS: About four years ago.

THE COURT: All right, Ms. Yellott?

JUROR YELLOTT: It was a criminal case last summer, the same jury that the first gentleman served on, the Indian.

THE COURT: You were here then? You know, it is amazing, I have got to tell you this. I run into people who say, oh, Judge, I would like to serve on the jury in federal court. I say I don't have anything to do with it. It is all computer. And then I have got people that they call two and three times, and say I don't want to serve. And I say I don't have anything to do with it. It's picked by random. All right. On the back row. All right, Mr. Albarado?

JUROR ALBARADO: Yes, sir. I served on a civil case in Cameron with Judge Ward Fontenot.

THE COURT: Yes, sir.

JUROR ALBARADO: It was an attempted rape case. And really wasn't very solid evidence or anything. And we just went through the motions, and had a hung jury. And I don't think it's ever come up again.

THE COURT: All right. And Mr. Askew.

JUROR ASKEW: Yes, sir. I served on Special Court Martial Board when I was in the military.

THE COURT: All right. Fine. Now, ladies and gentlemen, the next question I am going to ask you, but

before I ask it, I want to tell you, if your answer is yes, you have not done anything wrong. The question is, has anyone attempted to contact you, or any member of your immediate family concerning this case. Now, you see why I said if that has happened, you did not do anything wrong. But it is essential that we know. So I take it nobody has been attempted to be contacted by anyone. All right. Now, I am going to talk about you and members of your immediate family. So I will define immediate family. That is your parents, your spouse, your children and your brothers and sisters. Now, have any of you or any member of your immediate family ever filed a lawsuit or claim as a result of an accident? If you have, please raise your hand. All right. No one has.

JUROR PANIUSKI: What do you mean, an accident? Well, I would say it happened, I don't remember, it's been eight, maybe ten years ago, I guess I would say roughly somewhere in there, where my daughter had worked for Pizza Hut, and what they did was put a Co_2 tank in the trunk of my automobile. And what happened, when she turned off of Ryan to come down Prien Lake to deliver over on Highway 14, and when she turned, the tank wasn't secured. So in other words, what happened, it rolled. And when it hit the corner of the trunk, it popped the valve and accidently took and put her to sleep. And she hit the, which is Community Coffee Place, over there on Prien Lake Road there. The case that was filed.

THE COURT: Did she file a suit or claim as a result of that?

JUROR PANIUSKI: Well, she filed a suit which was settled, I believe.

THE COURT: Yes.

JUROR PANIUSKI: Was settled out of court.

THE COURT: That is what I am asking.

JUROR PANIUSKI: Yeah.

THE COURT: In other words, she did file a suit or claim as a result of an accident?

JUROR PANIUSKI: Yeah.

THE COURT: All right. Okay. Mr. White?

JUROR WHITE: My dad filed suit because of an accident going to Lafayette. It has been maybe a year ago, a year or so ago, because of an accident.

THE COURT: And suit was filed where? In Lafayette?

JUROR WHITE: No, sir. I believe it's filed either in Lafayette or Baton Rouge.

THE COURT: Has it been resolved yet?

JUROR WHITE: Yes, sir.

THE COURT: All right. The fact that your daddy was involved in a suit, and this is also for you, Mr. Paniuski, would that, in anyway, influence your decision in this case?

JUROR PANIUSKI: No, sir.

JUROR WHITE: No, sir, Your Honor.

THE COURT: Anyone else? Now, we are going to just flip the coin over on the other side. Have any of you or any members of your immediate family ever have a suit or claim filed against you? All right, Mr. Williams. Let's see am I getting this right?

JUROR WILLIAMS: Yes, sir.

THE COURT: All right. You are Mr. Williams. What was it about, sir?

JUROR WILLIAMS: I have a suit pending now against me. I am a contractor. A man worked for another man on a project I had finished, is suing me for eight hundred and fifty thousand dollars.

THE COURT: Give me that again, now, so I can understand. You are a contractor?

JUROR WILLIAMS: Yes, sir. I am a general contractor.

THE COURT: All right. A man working for you—

JUROR WILLIAMS: No. This man never worked for me, period. He was working for a contractor that was picking up salvage timber on a road right of way that I had cleared and built previously.

THE COURT: Uh-huh.

JUROR WILLIAMS: And he claimed to have a back injury. So he has a lawsuit pending against me, against my company now.

THE COURT: And sued because allegedly your company allegedly did something wrong?

JUROR WILLIAMS: Yes, sir.

THE COURT: All right. And that suit is still pending?

JUROR WILLIAMS: Yes, sir.

THE COURT: All right. The fact that that has occurred, would that, in anyway, influence your decision in this case?

JUROR WILLIAMS: No, sir.

THE COURT: Well, if it would, please tell us. I want to know whether it consciously or subconsciously, if you feel it would influence you.

JUROR WILLIAMS: I don't believe it would, sir.

THE COURT: In other words, what I want to make sure, Mr. Williams, is that if you sit as a juror in this case, and you go into the jury room, that you are not thinking of the circumstances of your case, and that you are actually just simply thinking about what was the evidence presented. The law as I give it to you, and render a decision without any thought whatsoever to Mr. Edmonson or Leesville Concrete Company. And can you do that?

JUROR WILLIAMS: Yes.

THE COURT: All right. Now, Ms. Fruge?

JUROR FRUGE: My father-in-law, I believe, came to court with a suit. His dog bit a little girl that was in the yard. And I believe they filed suit. But I really don't know any of the details about it. I don't think it would make any difference.

THE COURT: Well, let me make sure. I want you to tell me it will not make any difference.

JUROR FRUGE: No. It will not. I don't know any of the details.

THE COURT: All right. Anyone else? Mr. Gaspard?

JUROR GASPARD: I have an insurance company that has got a suit against our company, involving a salvage contract.

THE COURT: It is a suit on a contract?

JUROR GASPARD: Yes.

THE COURT: Would that, Mr. Gaspard, influence you in this case?

JUROR GASPARD: No.

THE COURT: Fine. Anyone else? Do any of you have any biases or prejudices against anyone who brings, who files a suit to recover for damages for injuries allegedly incurred in an accident? All right, Mr. White.

JUROR WHITE: Your Honor, a couple of years back, I don't know if this would have any influence on my decision, but a couple of years back, my brother's wife was robbed and raped in Plaquemines, Louisiana, a couple of years back.

THE COURT: Well, my question is, do you have any biases or prejudices against people who file a suit to recover for the injuries they allegedly incurred in an accident. Would you hold that against them because they filed a suit to recover for injuries they think was caused by someone else?

JUROR WHITE: Well, my brother, you know, he went through a whole bunch of stuff since this. And, naturally, that has some influence, you know, on the way I think.

THE COURT: Yeah. But you see, you are talking about a criminal situation.

JUROR WHITE: Yeah.

THE COURT: We are not talking about a criminal situation here, Mr. White. But I don't want to put words in your mouth because I want you to be honest with us. Because all the attorneys want to make sure you fully understand and can be a fair and impartial juror. And again, the question is simply that if somebody is injured in an accident, do you hold it against them if they

brought suit against the party allegedly causing the accident, to recover for their injury?

JUROR WHITE: No.

THE COURT: Can you do that in this case?

JUROR WHITE: Yes, sir.

THE COURT: In other words, if Mr. Edmonson proves that he was injured as a result of the actions of the defendant, would you render a verdict in his favor and award him damages that you find he is entitled to?

JUROR WHITE: Yes, sir.

THE COURT: And it would not influence your decision in any other way?

JUROR WHITE: No.

THE COURT: Anyone else? All right. Now, ladies and gentlemen, I am going to ask that you stand individually, and I will tell you now what it is, but I will prompt you in case you forget. I want your name, your address, your age, your occupation, your spouse's occupation and the number of children. I do not want the names or ages of your children. I know you are proud of them, but I just want to know how many. The other thing, the ladies are permitted, if they wish, to simply say I am over eighteen. So for an example, Ms. Fruge, if you don't want to tell us how old you are, that is all right. You can say I am over eighteen. On the other hand, Mr. Gaspard, you are going to have to tell us.

JUROR GASPARD: I have got to do it whether I want to or not?

THE COURT: All right. Would you start, Mr. Gaspard, please?

JUROR GASPARD: I am fifty. My name is Rod Gaspard. We own AGCO Auto Parts, auto parts salvage business.

THE COURT: That is a good idea. You might have a customer here.

JUROR GASPARD: Yeah. I was thinking about that all the time.

THE COURT: Surely.

JUROR GASPARD: Our business is located at 4401 South Lincoln Road, Lake Charles. My wife works in the business. I think she probably runs the thing. We have two children.

THE COURT: And you said you are fifty?

JUROR GASPARD: I am five-o, right.

THE COURT: And where do you live?

JUROR GASPARD: We live at Big Lake right now.

THE COURT: All right. Good. Thank you. Mr. Bradley?

JUROR BRADLEY: Ron Bradley. I live in DeRidder, twenty-five years old. I am not married. I don't have no kids. I work for Brock Construction out of DeRidder, Louisiana.

THE COURT: You do what, sir?

JUROR BRADLEY: I work for Brock Construction. I am a bucket truck operator.

THE COURT: Brock Construction Company, doing what, sir?

JUROR BRADLEY: Running a bucket truck, bucket truck operator.

THE COURT: A bucket truck operator?

JUROR BRADLEY: You know, like a high line.

THE COURT: All right.

JUROR BRADLEY: I run one of them.

THE COURT: All right, sir. Thank you very much.

JUROR ELOI: My name is Ara Eloi. I live at 217 Leland Street in Sulphur. My husband is a machinist. And we own a small company, Eloi Enterprises. And I have three children. And I am sixty-three years old.

THE COURT: And your husband, what kind of business is it, ma'am?

JUROR ELOI: It's a trailer park. And he has a rent house or two, and fifteen large trailer spaces, and then travel trailer spaces.

THE COURT: All right. Thank you very much.

JUROR ELOI: It's a small corporation.

THE COURT: All right. Ms. Hansbrough.

JUROR HANSBROUGH: I am Gladys Hansbrough. I live in DeQuincy, Louisiana. I have four children, four girls. One a paralegal aid lawyer. One drives for Greyhound, and the other one is a teacher. They are in Detroit. My baby girl is, she lives here in DeQuincy. She is a nurse's aid. I am a retired nurse and—

THE COURT: How about your husband?

JUROR HANSBROUGH: I am a widow.

THE COURT: How long have you been a widow?

JUROR HANSBROUGH: Seven years.

THE COURT: All right. Thank you very much. Mr. Combs.

JUROR COMBS: My name is Willie Combs. I live at 1010 8th Avenue. I am a lab technician at Himont, Incorporated. I have two children. My wife works in the home.

THE COURT: All right. Thank you. Mr. Simmons.

JUROR SIMMONS: My name is Wilton Simmons. I live in Kinder, Louisiana. Married. I have four children, grown. And I am retired.

THE COURT: What did you do before you retired?

JUROR SIMMONS: Worked in a cleaners.

THE COURT: I didn't hear you, sir.

JUROR SIMMONS: Worked in a cleaners, manager of it.

THE COURT: All right. And your wife is a housewife?

JUROR SIMMONS: House maid.

THE COURT: Thank you, sir. Mr. Dougherty.

JUROR DOUGHERTY: My name is Robert Dougherty. I reside at Route 1, Box 170, Roanoke. Personnel services officer for Jeff Davis Vo-Tech School in Jennings. My wife is a first grade teacher in Jennings. I have two children, a daughter twenty-one and a son eighteen.

THE COURT: And how old are you?

JUROR DOUGHERTY: I am forty-six.

THE COURT: Thank you very much.

JUROR ELOI: I am sixty-three.

THE COURT: Sixty-three. Okay. You didn't have to tell us. Mr. Paniuski.

JUROR PANIUSKI: My name is Lawrence John Paniuski. I live at 3001 Reidway, here in Lake Charles. Age fifty-six. And I have three children. And my wife stays home. And I work for Orkin Pest Control, service technician.

THE COURT: All right. Thank you. Mrs. Fruge.

JUROR FRUGE. My name is Nikki Fruge. I live at Route 4, Box 524, in Moss Bluff. I work for Magnolia Life Insurance as a mail clerk, file clerk. My husband works at Vista Chemicals. I have three children. And I am thirty-one.

THE COURT: All right. What does your husband do for Vista?

JUROR FRUGE: Chief warehouseman.

THE COURT: Thank you. Mr. Williams.

JUROR WILLIAMS: Charles T. Williams. Route 1, Anacoco, Louisiana. Me and my wife own two companies, general dirt contracting business. I am forty-four years old. And we have three children. And she is my partner and bookkeeper.

THE COURT: Thank you, sir. All right. Mrs. McBride.

JUROR McBRIDE: Eloise McBride. I am a widow. I work as a cashier. And I have four children.

THE COURT: And you are over eighteen?

JUROR McBRIDE: And I am over eighteen.

THE COURT: And where do you work, Mrs. McBride?

JUROR McBRIDE: Market Basket in Moss Bluff.

THE COURT: Thank you, ma'am. Mr. Soileau.

JUROR SOILEAU: My name is Phil Soileau. I am thirty-seven. I am a service engineer for Pitney Bowes. I have a wife that is a beautiful homemaker. And I have three children.

THE COURT: Thank you, Mr. Soileau. Mr. Dugas.

JUROR DUGAS: My name is Wavelle Dugas. I am twenty-seven. I am a warehouse manager in Welsh. And I have two kids.

THE COURT: Thank you, sir. Mrs. Yellott.

JUROR YELLOTT: My name is Roberta Yellott. I live at 436 Washington Street, in Lake Charles. I am assistant professor of mathematics at McNeese. My husband teaches geometry and coaches basketball at St. Louis High School. And we have three children.

THE COURT: Thank you, ma'am. Mr. Smith.

JUROR SMITH: My name is Ray Smith. I live at Route 1, Box 4, Ragley. And let's see. I am thirty-three years old. I work for the U.S. Postal Service here in Lake Charles as a letter carrier. My wife is a clerk for the Postal Service. And no kids.

THE COURT: Your wife is what, sir?

JUROR SMITH: A clerk for the Postal Service, downstairs, also.

THE COURT: All right. And you have how many children?

JUROR SMITH: No kids.

THE COURT: Thank you, sir. Mr. Albarado.

JUROR ALBARADO: James Albarado. I live at Route 3, Box 442, Lake Charles. Forty-two years old. I am a welder by trade. I have two kids. My wife is office manager for a computer company here in Lake Charles.

THE COURT: Thank you. Mr. White.

JUROR WHITE: My name is John White. I live at 102 Willow Lane, Ragley. I am a construction painter. And I am thirty-nine. My wife is a homemaker.

THE COURT: Any children?

JUROR WHITE: Two.

THE COURT: Thank you, sir. Mr. Askew.

JUROR ASKEW: John Askew. I am forty-two years old. I live at 732 Esplanade in Lake Charles. I am branch manager of Metropolitan Insurance Company here

in Lake Charles. I have two children. And my wife is a homemaker.

THE COURT: Thank you very much. All right. Gentlemen, do you want to approach the bench, please?

(Whereupon an off-the-record discussion was had between court and counsel at the bench.)

THE COURT: Mr. Williams.

(Proceedings at the bench, with Juror Williams and all counsel present.)

THE COURT: Mr. Williams, I want to ask you these question briefly because I want to make sure I understand. Now, in this particular case we have a person who was not working for Leesville Company, Leesville Concrete Company. He alleges some fault on their part in causing his accident. Now, what you were telling me, as a contractor, you were being sued to pay an employee of another company?

JUROR WILLIAMS: Same thing. Yes, sir.

THE COURT: Same thing. Yes, sir. And only you can answer. And I am just wondering if you feel like you can put aside your situation, if you hear this evidence develop, could you put aside your situation as if you never had—

JUROR WILLIAMS: I don't know. It would be hard for any human being to do that.

THE COURT: That is the reason I brought it up.

JUROR WILLIAMS: Yes, sir.

THE COURT: I think maybe under those circumstances, because of your position, I think maybe I might better let you off this one and get you on another one. Mr. Honeycutt, do you have any problem with that, sir?

MR. HONEYCUTT: No, sir.

THE COURT: Just go and have a seat, and we will let you go in a minute.

(Proceedings in open court, jury present.)

THE COURT: Mr. White, sir, would you come on up, please?

(Proceedings at the bench, with Juror White and all counsel present.)

THE COURT: Mr. White, now, you said that you have a brother whose wife was raped.

JUROR WHITE: Yes, sir.

THE COURT: Was this a black fellow that raped your brother's wife?

JUROR WHITE: Yes, sir.

THE COURT: Is that what you had your problem with here?

JUROR WHITE: Yes, sir.

THE COURT: Do you feel you would hold it against this man because a black raped your sister?

JUROR WHITE: I would like to say no, but I can't feel sure about it.

THE COURT: All right. Okay.

JUROR WHITE: I am being as honest as I can be.

THE COURT: All right. Okay. Do you have any problem, Mr. Honeycutt, with the court excusing him?

MR. HONEYCUTT: No, sir.

THE COURT: All right. Mr. Doyle, do you, sir?

MR. DOYLE: No, sir.

THE COURT: All right. Thank you. Go ahead and have a seat.

THE COURT: You see why I want to do this privately. Because I don't want to contaminate the jury.

MR. DOYLE: Yes, sir. I appreciate that.

THE COURT: Any other questions, Mr. Doyle?

MR. DOYLE: I am not sure I understood what that fellow Bradley said he did for a living.

THE COURT: Bradley, bucket truck operator.

MR. DOYLE: Okay.

THE COURT: That's what he said, but he said it so fast. That's why I had him repeat it.

MR. DOYLE: I don't have any other question.

THE COURT: Okay.

(Proceedings in open court, jury present.)

THE COURT: All right, ladies and gentlemen. As a judge, I feel a lot of times that we have to let the jury know everything that is going on. But I had some private questions I wanted to ask Mr. Williams and Mr. White, so that I could determine further whether they are qualified to serve as a juror. And I have made the determination that I am going to excuse Mr. Williams and Mr. White. So, gentlemen, you are free to go. You do not have to come back. And the government will mail you a check plus your traveling expenses in the next two or three weeks. Thank you so much for being so willing to perform your civic responsibility. All right. Draw two names, Mr. Chaddick, please. The first will take Mr. Williams' seat, and the second will take Mr. White's seat.

THE MARSHAL: As I call your name, will the first person occupy this empty seat over here, please. Number forty-two, Harold Herford. Number thirty-nine, Ms. Edith Klenk.

THE COURT: All right. For the time being, I am going to direct my questions to Mr. Herford and Ms. Klenk. First of all, did you hear me state what the case is about, and the parties involved?

JUROR HERFORD: Yes, sir.

THE COURT: All right. Did you hear me introduce the attorneys to the jury?

JUROR HERFORD: Yes, sir.

THE COURT: Do either of you know any of the attorneys or any of the parties involved in this case?

JUROR HERFORD: I know this nice gentleman over here, Mr. Doyle.

THE COURT: All right, sir.

JUROR HERFORD: We go to the same church.

THE COURT: Well, the fact that you go to the same church as Mr. Doyle, would that, in anyway, influence your decision in this case?

JUROR HERFORD: No.

THE COURT: And again, in particular, since you say you go to the same church as Mr. Doyle, if you were to sit on this jury and render a verdict in favor of the defendant, would you feel, the next time you ran into Mr. Doyle, that would, in anyway, embarrass you?

JUROR HERFORD: No, sir.

THE COURT: In other words, you would be willing to call it as you see it based on the law and the evidence and nothing else?

JUROR HERFORD: That's correct.

THE COURT: Ms. Klenk, do you have any comment on that?

JUROR KLENK: No, sir.

THE COURT: All right. You have heard me ask the other questions about serving on jury duty. Have either or you served on a jury?

JUROR HERFORD: I served on the jury in this court in January of last year.

THE COURT: What kind of case? Do you remember?

JUROR HERFORD: The case with the laborers local —well, I don't recall whether—

THE COURT: Oh, was that the case of United States of America versus Freeman Lavergne and Mose Collins?

JUROR HERFORD: Yes, sir.

THE COURT: You served on that jury, sir? That was a criminal case. All right. Any other cases that you have served on?

JUROR HERFORD: Oh, many years ago I served on one in the parish court. I suppose you would call it a damage case. But it resulted in no payment.

THE COURT: All right. Ms. Klenk, did you ever serve on a jury before?

JUROR KLENK: I served on a grand jury in DeRidder.

THE COURT: All right.

JUROR KLENK: About two years ago. And on a case here about a year and a half ago.

THE COURT: All right. Has anyone attempted to contact either of you concerning this case? All right. Have any of you, or any members of your immediate family ever filed a suit or claim against someone as a result of an accident?

JUROR HERFORD: No.

THE COURT: Or has anyone ever filed a suit or claim against you or any member of your immediate family? Do either of you have any bias or prejudice against someone who brings a lawsuit seeking to recover damages or injuries he alleges he incurred? All right. Then, Mr. Herford, we will start with you first. Would you stand and give your name, address, age, occupation and spouse's occupation, and number of children?

JUROR HERFORD: I am Harold Herford. I live at 800 Dolby Street, Lake Charles. I am retired. I am married. My wife has two children, I have three children. We have a bunch of grandkids. Anything else?

THE COURT: All right. And what did you do before you retired, sir?

JUROR HERFORD: I worked in a refinery, Conoco Refinery, in Westlake.

THE COURT: And what was your last job?

JUROR HERFORD: Operator foreman over the coking unit.

THE COURT: All right, sir. Thank you very much, sir. Ms. Klenk.

JUROR KLENK: My name is Edith Klenk. I live at 8 Cathy Drive, DeRidder, Louisiana. Sixty years old. I work for two doctors at Doctors Clinic as an administrator. And I have four children. And my husband is deceased.

THE COURT: All right. And you are over eighteen?

JUROR KLENK: Yes, sir.

THE COURT: All right. Thank you. All right. May I see the attorneys again, please?

(Whereupon an off-the-record discussion was had between court and counsel at the bench.)

THE COURT: Ms. Klenk, I have been advised that the plaintiff's wife takes her child or children to your clinic. Do you know that?

JUROR KLENK: I am not aware of it right now. I could probably refresh my memory.

THE COURT: Well, no. But for an example, the wife may testify in this case. And I want to know if you saw her, would you recognize her?

JUROR KLENK: I probably would.

THE COURT: All right. But then my question would be, the fact that she may go to the clinic where you work, I want to know would that, in anyway, influence your decision in this case?

JUROR KLENK: No, sir. I don't think so.

THE COURT: Well—

JUROR KLENK: No, it won't.

THE COURT: All right. Thank you. Mr. Herford, let me just ask you a question. And I want to make sure that I understand correctly. You see, what is going to be happening here is throughout the trial these attorneys will be asking questions. And at the end of the trial, they will be making their arguments to you. And I want to know, will you give more credence to this nice Mr. Doyle that you say that you know, and you go to church with, over the statements of Mr. Honeycutt?

JUROR HERFORD: Well, I shouldn't have said this nice Mr. Doyle. That was just repeating what you said.

THE COURT: Oh, you didn't do anything wrong, sir.

JUROR HERFORD: No. I don't honestly feel that our relationship would influence my opinion, in anyway.

THE COURT: And again, what I want to know is, in the event you should end up ruling, the jury rules for the defendant, that when you ran into Mr. Doyle, it would not, in anyway, embarrass you?

JUROR HERFORD: No.

THE COURT: In other words, you are going to call it as you see it?

JUROR HERFORD: Yes, sir.

THE COURT: You are going to listen to their arguments, but you are going to listen to the arguments with respect to what they argue about what the evidence is, and whether your interpretation of the evidence agrees with what they say?

JUROR HERFORD: Yes, sir.

THE COURT: And you will not give more to him simply because he goes to the same church as you?

JUROR HERFORD: No, sir. I haven't known him that long. I just do know him.

THE COURT: All right. All right, ladies and gentlemen. I am now going to submit to you a list, call off names of witnesses, and ask if you know any of them. And you are going to have to excuse my pronunciation of some of them. And I may need the lawyers to help me. First is Fred Bolgiano, William D. Sines, S-i-n-e-s. No, I am asking the jury if they know them. Eugene Brickhouse, Dr. Bruce E. Razzer, Charles O. Bettinger, Dr. William Cruze, Mrs. Crystal Edmonson.

THE CLERK: Judge.

THE COURT: Oh, all right. You say you know Dr. Cruze?

JUROR KLENK: I know Dr. Cruze, yes, sir. He used to be associated with our clinic.

THE COURT: All right. The fact that you know him, would you give his testimony any more weight than any other doctor simply because you know him?

JUROR KLENK: No.

THE COURT: Or would you give him less? You would not give him less weight either, would you?

JUROR KLENK: No, sir.

THE COURT: All right. Charles Schriber, Dr. Clark Gunderson. Mr. Soileau, do you know Dr. Gunderson?

JUROR SOILEAU: Dr. Gunderson was the doctor when my daughter broke her arm. He was her doctor.

THE COURT: Uh-huh. Now, would that, in anyway, influence your decision?

JUROR SOILEAU: No, sir.

THE COURT: In other words, again, I will ask the same question that I asked the other lady. The fact that he treated your daughter, would you give his testimony more weight than any other doctor in this case?

JUROR SOILEAU: No, sir.

THE COURT: Ms. Yellott.

JUROR YELLOTT: Dr. Gunderson treated my ankle.

THE COURT: Your ankle?

JUROR YELLOTT: Yes, sir.

THE COURT: Would that cause you any problem?

JUROR YELLOTT: No, sir.

THE COURT: In other words, if you don't agree with his testimony, that is the way it will be, is that right?

JUROR YELLOTT: Yes, sir.

THE COURT: Because there will be a lot of doctors testify. And you are going to have to determine from all these doctors who you believe and who you don't believe, or whether you accept their opinions or not, let's put it that way. All right. Anyone else on the back row? All right. Dr. Gilles R. Morin, Rick Tanner, Mrs. Fred Bolgiano, Kenneth Gordon, D. L. Elliott, Samuel James, Richard Thompson, Bernice Cryer, Dr. Percy Miller, Dr. George Hearn, Leonard Michaels, Peggy Kelly, Dr. Kenneth Boudreaux, Dr. J. Stewart Wood, Dr. James T. Murphy, Rebecca Broussard, Paul D. Ware, Dr. William Akins, Dr. R. Dale Bernauer, Dr. Gregory D. Lord, Dr. J. Lane Sauls, Dr. Fayez Shamieh. Wait, did you know Dr. D. Lord?

JUROR KLENK: Dr. Sauls.

THE COURT: Oh, Dr. Sauls.

JUROR KLENK: He was associated with our clinic, also.

THE COURT: He was, at one time?

JUROR KLENK: Yes, sir.

THE COURT: And, again, you are telling this court that you will not give him any more weight, his testimony any more weight than any other doctor?

JUROR KLENK: No, sir.

THE COURT: Unless you are impressed with the testimony here as opposed to you knowing him?

JUROR KLENK: Right.

THE COURT: All right. And Dr. Walter T. Snow. Mr. Askew?

JUROR ASKEW: I know Dr. Shamieh socially.

THE COURT: All right. The fact that you know him socially, would that cause you to give his testimony more weight than any other doctor in this case, sir?

JUROR ASKEW: No, Your Honor.

THE COURT: All right. Thank you. Gentlemen, may I see you at the bench again, please?

(Whereupon an off-the-record discussion was had between court and counsel at the bench.)

THE COURT: Ms. Klenk, would you come up, please, ma'am? Mr. Williams.

(Proceedings at the bench.)

THE COURT: Ms. Klenk, I want to just make sure we don't put you in an embarrassing position. And only you can answer. Now, you know some of these doctors?

JUROR KLENK: Yes, sir.

THE COURT: But, now, you say you are the administrator at the hospital?

JUROR KLENK: At the clinic.

THE COURT: At the clinic?

JUROR KLENK: Yes, sir.

THE COURT: Now, if I am not mistaken, I think maybe some other doctor treated this man when he first got hurt there in this clinic.

JUROR KLENK: That could be true. I am not sure.

THE COURT: All right. But what we are really concerned about is that having worked with these doctors, we are concerned, if not consciously but subconsciously, that could interfere with your decision in this case.

JUROR KLENK: Okay.

THE COURT: But I am not saying it will, but I am pointing out what your concerns are.

JUROR KLENK: Uh-huh.

THE COURT: And we certainly don't want to put you in an embarrassing position. Because if some of these fellows happen to come back to the clinic, although the first question you will be deciding is liability, which wouldn't have anything to do with treatment.

JUROR KLENK: I understand.

THE COURT: You see, but I am just wondering if this will, in anyway, give you any problems?

JUROR KLENK: Well, it is a small town. The doctors all go to the same church, you know, as we do. So I would be running into them. I don't know if they would feel—I would have no—

THE COURT: You see—

JUROR KLENK: —problem with it. But I don't know if they would.

THE COURT: Let me give you what may be an issue in the case. What the issue may be is whether this accident which this man contends caused him the injury that he has now, and the other side is saying the accident did not cause the things he is complaining about now. And that is where the problem comes in. You see, if you know these people, would you turn around and say, well, after working there I believe him, whereas if you heard another doctor say, no, it wasn't caused by the accident, how it would affect your decision.

JUROR KLENK: I think one that you knew would maybe influence you a little.

THE COURT: Well, let me say this. I don't have any problem, I can excuse you if you think it might pūt you in an embarrassing position.

JUROR KLENK: Okay.

THE COURT: Because we have others.

JUROR KLENK: I think I would rather not serve on this jury if it wouldn't cause—I could be—

THE COURT: You could try to do as well as you could.

JUROR KLENK: Yes, sir. But I would not mind being excused. That would not bother me.

THE COURT: All right. Mr. Doyle?

MR. DOYLE: Judge, I certainly have no objection.

THE COURT: Mr. Honeycutt?

MR. HONEYCUTT: Ms. Klenk had indicated it wouldn't bother her to see the doctors if it wouldn't bother them. I am not sure she understands the doctors are not to come live to the trial here. They wouldn't know she is on the jury. In essence, they are all video doctors. So there wouldn't be the face-to-face confrontation.

THE COURT: Do you understand what he is saying?

JUROR KLENK: Yes, sir.

THE COURT: No doctor will appear here live.

JUROR KLENK: Okay. I could look at the evidence without any prejudice, I am sure. But if it is going to be a problem, I don't want any of you all to think I might be swayed.

THE COURT: No, ma'am. It is not a question of what they feel.

JUROR KLENK: Okay.

THE COURT: No. It is simply to make sure, what the ultimate question is, whether you think you can be fair and impartial.

JUROR KLENK: Yes, sir, I think I can.

THE COURT: That's what he wants, and that's what he wants.

JUROR KLENK: Okay.

THE COURT: In other words, all we are saying, if you work for some people, then it is kind of difficult to say, it may be contrary to what they think.

JUROR KLENK: Yes, sir.

THE COURT: And then on the othed hand, you could run into these people again.

JUROR KLENK: Yes, sir, probably so.

THE COURT: And then if they find out you have been on the jury, some of them may be offended.

JUROR KLENK: Right.

THE COURT: Since it is the plaintiff's family going to the clinic.

JUROR KLENK: Yes, sir. Even though I can't place them right at this minute, I am sure they will be coming back. And it might make them feel—

THE COURT: Well, what would you prefer to do, ma'am, in this situation?

JUROR KLENK: I would prefer not to serve, I think.

THE COURT: On this case?

JUROR KLENK: Yes, sir.

THE COURT: Some other case maybe, but not this one?

JUROR KLENK: Right.

THE COURT: Because of the relationship?

JUROR KLENK: Right.

THE COURT: To the parties involved and some of the witnesses?

JUROR KLENK: Right.

THE COURT: Okay. I think the only fair thing, because I don't feel that a juror should be put in a position that they have to be concerned with rendering a verdict, and knowingly saying, well, I want to make sure I am doing this as opposed to this. I think it could put you in a position where you would maybe overreact.

JUROR KLENK: Sometimes I overreact the other way.

THE COURT: That's true. All right. Thank you, ma'am. We are going to excuse you, and you can go home. And you don't have to come back until you get another notice.

JUROR KLENK: Okay.

THE COURT: Yes, ma'am.

(Proceedings in open court, jury present.)

THE COURT: Mr. Chaddick, call one name, please.

THE MARSHAL: Number four, Odgen Abshire.

THE COURT: Mr. Abshire, did you hear me state what the case was about?

JUROR ABSHIRE: Yes, sir.

THE COURT: Do you know anything about this case other than what you have heard in the courtroom today?

JUROR ABSHIRE: No, sir.

THE COURT: Did you know anything as to all the other questions I have asked the other jurors that you should answer in the negative?

JUROR ABSHIRE: No, sir.

THE COURT: Have you ever filed a suit or claim against anyone?

JUROR ABSHIRE: No, sir.

THE COURT: Or any member of your immediate family?

JUROR ABSHIRE: I beg your pardon?

THE COURT: Or any member of your immediate family ever file suit?

JUROR ABSHIRE: No, sir.

THE COURT: Anyone ever file a suit or claim against you, or any member of your immediate family?

JUROR ABSHIRE: No, sir.

THE COURT: All right. Why don't you just stand, sir, and give your name, address, age, etc.?

JUROR ABSHIRE: I can give you everything but my address.

THE COURT: Ail right, sir.

JUROR ABSHIRE: I just moved to a new place.

THE COURT: All right.

JUROR ABSHIRE: I am camping. My name is Odgen Abshire. I live at 3619 Texas Street, Apartment 50.

THE COURT: That is in Lake Charles?

JUROR ABSHIRE: Lake Charles. I am retired. Sixty-seven years old. I got four kids. My wife is retired.

THE COURT: All right. And what did you do before you retired, sir?

JUROR ABSHIRE: I was manager for Boyce Machinery.

THE COURT: What? You were sales manager or general manager or what?

JUROR ABSHIRE: Branch manager.

THE COURT: Branch manager here in Lake Charles, sir?

JUROR ABSHIRE: Yes, sir, in Lake Charles.

THE COURT: All right, sir. What did your wife do before she retired?

JUROR ABSHIRE: She was a nurse's aid at Memorial Hospital.

THE COURT: All right, sir. Thank you very much. You may be seated. All right, gentlemen. One more time, please.

(Whereupon an off-the-record discussion was had between court and counsel at the bench.)

(Proceedings in open court, jury present.)

THE COURT: I want to apologize to you, Mr. Abshire, but I am going to ask you a question. I think it is a stupid one, but I have been requested to ask you, so I am going to ask you. Do you know what a concrete truck is?

JUROR ABSHIRE: Yes, sir.

THE COURT: I thought you would.

JUROR ABSHIRE: Yes, sir.

THE COURT: And do you know what a curb and gutter machine is?

JUROR ABSHIRE: A what, sir?

THE COURT: A curb and gutter machine?

JUROR ABSHIRE: Yes, sir.

THE COURT: Okay. All right.

(Whereupon an off-the-record discussion was had between court and counsel at the bench.)

(Proceedings in open court, jury present.)

THE COURT: Do you know any of the witnesses' names who I called off, Mr. Abshire?

JUROR ABSHIRE: No, sir.

THE COURT: All right. Thank you very much. Ladies and gentlemen, I apologize for taking so long to do this job. Normally, we finish it in half that time. We are going to take a break and ask you to come back in ten minutes, and then we are going to tell you who will serve and who won't serve. So we will take a break. You can walk around outside, but come back and occupy the same seats you are occupying. With that, court is in recess for ten minutes.

(Resuming after a recess.)

(Proceedings in chambers, all counsel present.)

THE COURT: All right, Mr. Williams. The court has before it a motion by defendants to quash the taking of a deposition of—who was that?

MR. DOYLE: Mrs. Bolgiano, Samuel James and Rebecca Broussard. But it was primarily about her.

THE COURT: And the court had a conference in this matter, and the court made a ruling. Mr. Doyle, do you want to put the ruling on the record?

MR. DOYLE: Yes, sir. Under the rule, the deposition would be quashed because they were noticed outside the contemplation of your local rule, which required that discovery be completed thirty days prior to trial, which all sides acknowledged. But because of the nature of the testimony we were trying to ascertain from at least Ms. Bolgiano, who had never been deposed before, you indicated that since she apparently is going to testify about bribery, or some alleged bribery, that after the plaintiff had an opportunity to give his direct examination on the witness stand, that you were going to conduct an in-chambers interview, with counsel present, with witnesses who had this alleged bribery testimony to give, so you could make some finding as to whether it would be allowed, I suppose, or whether it was maybe just to give all sides an opportunity to determine what they were going to say. I don't really know the purpose of the in-

chambers hearing. But I know it was discussed at the time we talked about the depositions.

THE COURT: And, Mr. Honeycutt, basically, is that correct?

MR. HONEYCUTT: That is basically my understanding. Simply the depositions were quashed and after the plaintiff testified on direct, you wished to interview the witness on the bribery question in chambers.

THE COURT: Let me see if I can recall it correctly, that before I would allow you to ask any question about the bribery—

MR. DOYLE: That's right.

THE COURT: —I would interview the witnesses?

MR. DOYLE: That's right.

THE COURT: I would have the information, and then I would then decide whether you should be granted permission to inquire as to this question, isn't that what you recall?

MR. HONEYCUTT: I believe that is correct, Your Honor.

THE COURT: All right. Let the record reflect the court's ruling. And this reflects taking care of the motion to quash the taking of the depositions, which I have before me. All right. That takes care of that. All right. Well, Mr. Doyle, is this yours, sir?

MR. DOYLE: Judge, I am sorry.

THE COURT: Would you change that, please?

MR. DOYLE: Yes, sir. That is the force of habit, Judge.

THE COURT: Let the record reflect and note the change, both said challenges for the defendant. All right. But I want to make sure—

MR. HONEYCUTT: That is mine, Judge.

THE COURT: The plaintiff challenges Mr. Paniuski, number twenty-eight; Dugas, number five; Askew, number thirty-two. The defendant challenges number three, Combs; number forty-two, Harold Herford, and number twelve, Simmons.

MR. DOYLE: Your Honor, I have an objection to make for the record.

THE COURT: All right, sir.

MR. DOYLE: Based on the case of Batson versus Kentucky, Your Honor. I would ask that the court recognize that two of the jurors challenged preemptorily by the defendant in this case are black, and that the plaintiff is black. Batson versus Kentucky is cited at 106 Supreme Court Reporter 1712. It was decided on April 30th of 1986, and it specifically rules that the sixth and fourteenth amendments, the portion of the fourteenth amendment dealing with the use of preemptory challenges to exclude jurors based solely on race without a voiced neutral explanation by the party challenging violates a litigant's rights under the sixth and fourteenth amendments. Now, the Batson case was a criminal matter. But some of the quotations from the Batson case that are particularly important to this one are on page 1716, which recognizes that previous decisions laid the foundation for the Supreme Court. And I am quoting, unceasing efforts to eradicate racial discrimination in the procedure used to select the venire from which individual jurors are drawn. So under Batson versus Kentucky, Your Honor, I am arguing the defendant in the case is not entitled to exercise a preemptory challenge to exclude a juror from service solely based on race, when that race is the same as that of the litigant, and otherwise he has to articulate a neutral explanation.

THE COURT: Let me ask you a couple of questions, Mr. Doyle.

MR. DOYLE: Yes, sir.

THE COURT: Since you are quoting amendments to the Constitution of the United States, sir, what does the sixth amendment say?

MR. DOYLE: Judge, I don't have it quoted verbatim.

THE COURT: Well, I want to know what it says, sir.

MR. DOYLE: I am quoting out of the Batson case.

THE COURT: Now, you are making an argument to me, sir. I want you to tell me what does the sixth amendment say, and what does it deal with?

MR. DOYLE: I can't quote it to you.

THE COURT: Let's get it out and see.

MR. DOYLE: All right, sir.

THE COURT: Let's get off the record and get it and see.

(Whereupon an off-the-record discussion was had between court and counsel.)

THE COURT: Okay. Let's get on the record. All right. The court has just finished going through the preemptory challenges and has the jury picked in this case. And now, Mr. Doyle, representing the plaintiff, now objects to the defendant preemptory challenging two black jurors. I don't recall, but I know we had several black jurors on the panel. I am told there were three. I didn't count them. I don't count whether they are black or white. I just count whether we have twelve people. Now, Mr. Doyle has raised the question at this point, and his argument first started off under the sixth and fourteenth amendments to the Constitution of the United States. He wants me to require the defendant to elicit, for me to elicit from the defense counsel why he has challenged two black jurors in this case. It is always amazing to the court that the plaintiff is black, and the court notes that the plaintiff did not challenge any of the black jurors. Maybe I ought to ask the plaintiff's lawyers, since he wants to challenge only white jurors, because his client is black, whether he should explain why he did not remove any of the black jurors. But I won't do that. But I find that this is an issue which counsel for the plaintiff should have known before appearing in court and selecting the jury today. This court did not know the color of the plaintiff in this case until the case started. If counsel for the plaintiff had an argument, he certainly

should have given the court the privilege and opportunity of having the right to research and check out the law. And all he has furnished the court is the case of Batson versus Kentucky, which is a criminal case and deals with criminal matters. So the request by plaintiff's attorney to have the defense attorney explain the reasons why he exercised a preemptory challenge the way he did is denied. Now, do you want to add something else on the record?

MR. DOYLE: No, Your Honor.

THE COURT: Mr. Honeycutt, do you want to add something on the record, sir?

MR. HONEYCUTT: No, sir.

THE COURT: All right. We will proceed in court and select the jury, and then recess until after lunch.

MR. DOYLE: Thank you.

THE COURT: We will see you in court in about two minutes, gentlemen.

MR. HONEYCUTT: All right, sir.

MR. DOYLE: Thank you, judge.

(Proceedings in open court, jury present.)

THE COURT: Mr. Chaddick, will you tell those who are to take their seat in the audience?

THE MARSHAL: As I call your name and number, would you please have a seat in the gallery? Number three, Willie Combs; number five, Wavelle Dugas; number twelve, Wilton Simmons; number twenty-eight, Lawrence Paniuski; number thirty-two, John Askew; number forty-two, Harold Herford.

THE COURT: All right. Do you want to swear them, please?

(Whereupon the jury panel was duly sworn by the clerk.)

THE COURT: All right, ladies and gentlemen. I will just be very brief with you now, because we are going to let you go to lunch. I simply want to tell you that I will ask that you not speak to anyone about the case. Specifically, I am going to ask that you not speak to any

of the attorneys, or any of the parties in this case. For an example, if you meet them in the hall, do not say good morning, good afternoon, hello, or good-bye. Don't speak to them at all. Don't say a word to them. And I am instructing them not to say one word to you. So I want you to understand, first of all, of course, if a lawyer sees you coming, he recognizes you as a juror, and he may turn his head so that he doesn't have to be confronted with the situation. I want you to know he is not trying to be rude to you. He is carrying out my instructions because he can get in trouble with me if he violates this order. So that is the way we are going to operate. So when you come back from lunch, we will then tell you in great detail what you should or shouldn't do. Now, do you all think you can be back by 1:30? All right. Everybody be back at 1:30. Now, we will show you the jury lounge area where you will report when you come back. All right. Thank you. We will see you at 1:30.

(Jury excused.)

(Proceedings out of the presence of the jury.)

THE COURT: Does the plaintiff have anything further to cover?

MR. DOYLE: No, sir, Your Honor, not at this time.

THE COURT: Defense?

MR. HONEYCUTT: Not at this time, Your Honor.

THE COURT: All right. Court will be in recess until 1:30 p.m.

(Court recessed.)

AFTERNOON SESSION

(Proceedings out of the presence of the jury.)

THE COURT: All right, gentlemen. The court has been mulling over the question presented by plaintiff's counsel urging that the case of Batson versus the State of Kentucky is applicable in this case. And that any time there is a black defendant or black plaintiff, then

the opposing party in the civil or criminal case, in order to knock a person of the opposing party's race off the jury, must articulate his reasons showing they are non-race related. Am I correct, Mr. Doyle?

MR. DOYLE: That is a correct statement, Your Honor.

THE COURT: And in counsel's argument to the court, he argued that the Sixth Amendment of the Constitution of the United States applied, as well as the Fourteenth Amendment. And correct me if I am in error, counsel, but you said you could find no case to support your position, that you were entitled to have the defendant in this case articulate reasons why he preemptorily challenged two blacks today.

MR. DOYLE: Your Honor, so that I make clear, if Your Honor please, for the record, what I argued was that Batson contained language, which in my interpretation of it, allowed for reasonable extension of the law into an area that it does not now exist. There are no civil cases applying Batson or any case like it. On the issue of articulation of reasons for preemptorily challenging of jurors, I didn't mean to give the court the impression that any time there was in existence any civil case with a similar ruling.

THE COURT: Yeah.

MR. DOYLE: I am simply arguing for the good faith extension of Batson to civil cases.

THE COURT: All right. I agree with you, Mr. Doyle. And that is correct. You did tell the court you could find no case, civil case to support your position?

MR. DOYLE: That's right, Your Honor.

THE COURT: So if I incorrectly stated it, I want to correct it.

MR. DOYLE: No, sir. I just want to make it clear for the record. I didn't want the court to conclude that I had not been in good faith in arguing.

THE COURT: All right. Mr. Honeycutt, did you want to say anything before I go further?

MR. HONEYCUTT: Your Honor, our argument simply is that Batson is a criminal case. And the Sixth Amendment applies to rights and circumstances under criminal law. And that counsel could not and has not cited any civil authority at all to apply that criminal holding to a civil matter such as this one.

THE COURT: All right. Let the court go ahead and hold at this time so that hopefully we can proceed with the case. In the history of preemptory challenges, it has always been understood in both civil and in criminal cases that a party to a lawsuit had the right to excuse a certain number of people from the jury without giving any reasons therefor. And that has existed, as far as I know, since this Constitution of the United States went into existence two hundred years ago this year, and in fact, this month. And it was only recently that the Supreme Court of the United States went on to hold that in a criminal case, if the prosecution were to challenge black citizens where a black defendant was the defendant in the case, that the state had to articulate its legitimate reasons, and they have to be other than race as a basis for exercising its preemptory challenges. I have read the Batson case and I don't, I am unable by any stretch of the imagination to stretch the Batson case to apply to a civil case. And since I find no law that supports that position, I must accept the law as it exists now, and leave that up to the appellate court or the Supreme Court of the United States as to whether to change the preemptory system in civil jury cases. But again, for the record, so that the record is clear, so that the parties in the event that they want to appeal, in the qualifying of eighteen jurors in order to pick twelve of the eighteen qualified, three were of the black race, the same as the plaintiff. The plaintiff certainly did not challenge any of the black jurors. He challenged nothing but white jurors. The defendant challenged two of the three black jurors and a white juror. The court finds there is no discrimination, no violation of the law in the selection

procedure. And the motion to have the defendant articulate the reasons why he challenged the two black jurors is denied. I make this on the record so that in the event of an appeal, the record will be clear as to the court's ruling. And before we finish this issue, Mr. Doyle, I am going to give you an opportunity to add any and everything else you want on the record. Mr. Honeycutt, I will let you add anything else you want, then I will even let Mr. Doyle come back and add some more so that you have your full opportunity. So why don't you come up to the podium and make any further argument you wish. And I am not going to interrupt you. And I am not going to say another word about the issue.

MR. DOYLE: Thank you, Judge. The only other additional argument I would, or not argument, but point I would like to make for the record is upon receiving the correction from the court as to the proper amendment which applies to civil juries, my argument is that the Seventh Amendment gives a right to a civil jury, and that that right to a jury presupposes the same kind of jury, free from prejudice, that Batson mentions. And that is the only addition I would make, Your Honor.

THE COURT: Add anything else you want, Mr. Doyle.

MR. DOYLE: That's all I have got to say, Judge.

THE COURT: Please, please, now is your time.

MR. DOYLE: I am through, Judge.

THE COURT: All right. Mr. Honeycutt, do you want to add anything else, sir?

MR. HONEYCUTT: Yes, sir. Just to make what I hope will be a summary, and a concise statement, which is really sort of a rehashing of what I have already said, the case relied upon by the plaintiff's counsel, Batson versus Kentucky, was a criminal case. It was not a civil case. This is a civil proceeding. The amendment relied upon by plaintiff's counsel essentially was the Sixth Amendment to the United States Constitution, which is an amendment cited that relates to circumstances regard-

ing criminal rights and criminal law. Counsel, by his own admission, has not and cannot cite a single civil authority in support of his position, that I, as counsel for the defendant, articulate reasons for having challenged two of the three, preemptorily having challenged two of the three black members of the jury panel. As an aside, I would note that both plaintiff and defendant were accorded three challenges. There were three blacks. And if it were discriminatory action, the three, my three challenges could have been asserted against the three blacks. That has nothing to do with the matter. I simply threw that in as an aside remark. But essentially, the plaintiff can cite no civil authority, by his own admission, to have the holding in Batson apply to any civil proceeding, this one included. Thank you.

THE COURT: Mr. Doyle, come on up, please, sir.

MR. DOYLE: Judge, I have nothing further.

THE COURT: Please, if you have got somthing else, don't sit down, counsel. Come up and say it.

MR. DOYLE: Judge, I am going to save my breath. Thank you for the opportunity.

THE COURT: All right. Now, do we have another ruling to make before we get started?

(Proceedings deleted.)

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted in Printing)

SPECIAL INTERROGATORIES TO THE JURY

1. Do you find from a preponderance of the evidence that Leesville Concrete Company, Inc. was negligent in the manner claimed by Thaddeus Donald Edmonson and that such negligence was a legal cause of injury to Mr. Edmonson?

   Answer Yes or No Yes

   (If you answered "No" to Question 1, do not answer any of the following questions. You have finished your deliberations.)

2. If you answered "Yes" to Question 1, do you find from a preponderance of the evidence that Thaddeus Donald Edmonson was himself negligent in the manner claimed by Leesville Concrete Company, Inc. and that such negligence was a legal cause of his own injuries?

   Answer Yes or No Yes

   (If you answered "No" to Question 2, do not answer Question 3. Proceed to Question 4.

3. From a preponderance of the evidence, what proportion or percentage did the negligence of the respective parties, if any, legally cause Thaddeus Donald Edmonson's accident and injuries?

Leesville Concrete Company, Inc.	20%
Thaddeus Donald Edmonson	80%
TOTAL	100%

4. What is the total amount of damages, if any, that you find Thaddeus Donald Edmonson suffered as a result of the accident and injuries?

a) Loss of Past Earnings	$25,000.00
b) Loss of Future Earnings	$ ∅
c) Amount of *past* medical and hospital expenses incurred by Thaddeus Donald Edmonson as a result of the fault of the defendant	$ 1,200.00
d) Amount of *future* medical and hospital expenses to be incurred by Thaddeus Donald Edmonson	$ ∅
e) Amount of general damages	$63,800.00

SIGNED at Lake Charles, Louisiana, this 5 day of August, 1987.

/s/ Ray L. Smith
Foreperson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted in Printing)

JUDGMENT

The above numbered and entitled cause, having come on for trial by jury pursuant to regular assignment with plaintiff, defendant and intervenor present or represented; and the jury, after hearing the evidence, the argument of counsel and the instruction of the Trial Court, and having reached its verdict as rendered and signed on August 5, 1987, in the words and figures as follows:

1. Do you find from a preponderance of the evidence that Leesville Concrete Company, Inc. was negligent in the manner claimed by Thaddeus Donald Edmonson and that such negligence was a legal cause of injury to Mr. Edmonson?

   Answer Yes or No — Yes

2. If you have answered "Yes" to Question 1, do you find from a preponderance of the evidence that Thaddeus Donald Edmonson was himself negligent in the manner claimed by Leesville Concrete Company, Inc. and that such negligence was a legal cause of his own injuries?

   Answer Yes or No — Yes

3. From a preponderance of the evidence, what proportion or percentage did the negligence of the respective parties, if any, legally cause Thaddeus Donald Edmonson's accident and injuries?

Leesville Concrete Company, Inc.	20%
Thaddeus Donald Edmonson	80%
Total	100%

4. What is the total amount of damages, if any, that you find Thaddeus Donald Edmonson suffered as a result of the accident and injuries?

a) Loss of Past Earnings	$25,000.00
b) Loss of Future Earnings	$ 0
c) Amount of *past* medical and hospital expenses incurred by Thaddeus Donald Edmonson as a result of the fault of the defendant	$ 1,200.00
d) Amount of *future* medical and hospital expenses to be incurred by Thaddeus Donald Edmonson	$ 0
e) Amount of General Damages	$63,800.00

Ray L. Smith
Foreperson

IT IS ORDERED, ADJUDGED AND DECREED that the said verdict of the jury be and is hereby made the Judgment of this Court, and accordingly, the defendant, LEESVILLE CONCRETE COMPANY, INC., is hereby cast in Judgment for the sum of EIGHTEEN THOUSAND AND NO/100 ($18,000.00) DOLLARS, together with the legal interest thereon from date of judicial demand until paid with costs to be shared in equal amounts by plaintiff and intervenor together with defendant.

IT IS ORDERED, ADJUDGED AND DECREED that the intervenor, AMERICAN GENERAL FIRE & CASUALTY COMPANY, is entitled to be reimbursed for medical expenses and weekly benefits by preference and priority from the proceeds of the judgment in the sum of EIGHTEEN THOUSAND AND NO/100 ($18,000.00) DOLLARS together with legal interest from date of judicial demand.

JUDGMENT READ AND SIGNED in Lake Charles, Louisiana, this 28th day of September, 1987.

/s/ Eari E. Veron
Judge, United States District Court
Western District of Louisiana

/s/ James E. Williams
JAMES E. WILLIAMS
Lake Charles, LA 70602
Attorney for Plaintiff

/s/ John B. Honeycutt, Jr.
JOHN B. HONEYCUTT, JR.
Alexandria, LA 71309
Attorneys for Defendant

/s/ David McCain
DAVID MCCAIN
Lake Charles, LA 70602
Attorneys for Intervenor

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted in Printing)

MOTION TO NOTICE APPEAL TO THE COURT OF APPEAL FROM A JUDGMENT RENDERED BY A JURY FROM THE WESTERN DISTRICT OF LOUISIANA

NOW INTO COURT, through undersigned counsel, comes THADDEUS DONALD EDMONSON, who with respect represents that:

1.

NOTICE IS HEREBY GIVEN that THADDEUS DONALD EDMONSON, plaintiff above hereby appeals to the UNITED STATES COURT OF APPEALS FOR THE FIFTY CIRCUIT FROM A FINAL JUDGMENT rendered by a jury and said Judgment being signed and entered in this action on the 29th Day of September, 1987.

WHEREFORE, THADDEUS DONALD EDMONSON prays that his foregoing Motion be granted.

By His Attorney,
(A Professional Law Corporation)

/s/ Robert E. Patrick
ROBERT E. PATRICK
#7449
Attorney at Law
1114 Railroad Avenue
Lake Charles, LA 70601
(318) 433-7871 or 433-7873

(Certificate of Service Omitted in Printing)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-4804

THADDEUS DONALD EDMONSON,
Plaintiff-Appellant,
v.
LEESVILLE CONCRETE COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

Dec. 5, 1988

Before WISDOM, GEE and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The issue is whether the guarantee of equal protection of the laws forbids the exercise of peremptory challenges on racial grounds by a private litigant in the trial of a civil case in federal district court. We hold that it does, thus extending the principle announced by the Supreme Court in *Batson v. Kentucky*.[1]

I.

Injured in an accident on a construction job at Fort Polk, Louisiana, a federal enclave, Thaddeus Donald Ed-

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[1] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

monson, a 34-year-old black male, sued Leesville Concrete Company for negligence in federal district court.[2] The case was tried to a jury.

Edmonson used all three of his peremptory challenges to excuse members of the venire who were white. Leesville challenged peremptorily two prospective jurors who were black and one who was white. Citing *Batson*, Edmonson asked the district court to require Leesville to articulate a neutral explanation for the manner in which it had exercised its challenges. The district court denied the request on the ground that the *Batson* ruling did not apply to civil proceedings, and then proceeded to impanel a jury composed of eleven white jurors and one black juror. The jury rendered a verdict for Edmonson, assessing his total damages at $90,000, but because it found him 80% contributorily negligent, awarded him only $18,000. Edmonson seeks a new trial because of Leesville's alleged racial discrimination in its exercise of peremptory challenges.

II.

In *Batson*, the Supreme Court held that the equal protection clause of the Fourteenth Amendment forbids the prosecutor in a state criminal action to exercise peremptory challenges to remove members of the defendant's race from the venire. A defendant in such a case, the Court noted, may establish a prima facie case of purposeful discrimination in the selection of the petit jury "solely on evidence concerning the prosecutor's exercise of peremptory challenges" at the trial.[3] To do so, the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of his race from the venire. Second, the defendant may rely on the indisputable fact that "peremptory challenges constitute a jury

[2] 28 U.S.C. § 1331.

[3] 476 U.S. at 94-8, 106 S.Ct. at 1722-23.

selection practice that permits 'those to discriminate who are of a mind to discriminate.' "[4] Finally, the defendant must show that these facts and any other relevant circumstances "raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[5] In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. The Court stated, "We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors."[6]

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[7] After receiving the State's explanation, the trial court "will have the duty to determine if the defendant has established purposeful discrimination."[8]

While *Batson* was based on the equal protection clause of the Fourteenth Amendment, which applies only to the states, and the Constitution contains no equivalent express provision concerning federal governmental action, the due process clause of the Fifth Amendment, which applies to federal action, implies a like guarantee against the denial of equal protection of the laws by the federal government.[9] We must initially determine, therefore, whether

[4] *Id.*, 476 U.S. at 96, 106 S.Ct. at 1723 (citing *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)).

[5] *Id.*, 476 U.S. at 96-8, 106 S.Ct. at 1723.

[6] *Ibid.*

[7] *Ibid.*

[8] *Id.*, 476 U.S. at 96-9, 106 S.Ct. at 1723-24.

[9] *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *United States v. Hawes*, 529 F.2d 472 (5th Cir.1976).

the exercise of peremptory challenges by a private litigant in a civil action pending in federal court is a government action, to which the Fifth Amendment applies, or a private action, which the Constitution does not reach. If the action is governmental in nature, we must then decide whether to extend the principle underlying *Batson* to civil cases.

III.

The equal protection guarantee does not forbid discrimination by private persons. As the level of interaction and cooperation between private individuals and the state arises, however, it becomes increasingly difficult to discern precisely where private conduct ends and state action begins.[10] The Court has said, in *Burton v. Wilmington Parking Authority*,[11] "[T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." The criterion, the Court later stated in *Moose Lodge No. 107 v. Irvis*,[12] is whether the government has "'significantly involved itself with invidious discriminations.'"

In *Lugar v. Edmondson Oil Co.*,[13] the Court formulated more precisely its inquiry into state action: "[T]he

[10] *See* Brest and Levinson, Processes of Constitutional Decisionmaking at 821 (2d ed. 1982); Black, "State Action," Equal Protection and California's Proposition 14, 81 Harv.L.Rev. 69 (1967).

[11] 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961) (citations omitted).

[12] 407 U.S. 163, 173, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972) (citing *Reitman v. Mulkey*, 387 U.S. 369, 380, 87 S.Ct. 1627, 1634, 18 L.Ed.2d 830 (1967)); *see also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

[13] 457 U.S. 922, 939, 102 S.Ct. 2744, 2755, 73 L.Ed.2d 482 (1982).

first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." The "second question," *Lugar* stated, it whether, under the facts of the case, the private persons "may be appropriately characterized as 'state actors.'"[14] That requirement was met in *Lugar* because "a private party's joint participation with state officials . . . is sufficient to characterize that party as a 'state actor' . . . ."[15]

In a number of other cases the Court has traced the line that separates private from governmental action.

Shelley v. Kraemer[16] established that the equal protection clause forbids judicial enforcement of restrictive covenants based on race. Despite the fact that a restrictive covenant is a contractual arrangement between private parties, the Supreme Court held that enforcement of such private agreements by "judicial officers in their official capacities is to be regarded as action of the State."[17] Confronted by overlapping relationships between public and private actors, the Supreme Court in *Shelley* recognized that governmental action triggered by a private litigant retains its official character. Thus, the Court held in *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*,[18] state-appointed trustees may not enforce a provision in a will setting up a school for "poor white male orphans" by denying admission to a non-white person.

In *Tulsa Professional Collection Services v. Pope*,[19] the Court held that the state acts when "private parties make

[14] *Ibid.*

[15] *Id.*, 457 U.S. at 941, 102 S.Ct. at 2756.

[16] 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

[17] *Id.*, 334 U.S. at 14, 68 S.Ct. at 842.

[18] 353 U.S. 230, 231, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957).

[19] —— U.S. ——, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988).

use of state procedures with the overt, significant assistance of state officials," as was the case when the executrix of an estate denied a claim made under a state nonclaim statute that became operative only after probate proceedings had been commenced. In that situation, the time bar was not self-executing; the "probate court is ultimately involved throughout, and without that involvement the time bar is never activated." [20]

In *Burton v. Wilmington Parking Authority*, the Court held that the exclusion of a black would-be patron from a restaurant located in a state-owned and operated parking facility was state action even though the decision to do so was made by the restaurant operator, a private concern. The state "effectively abdicate[d] its responsibilities," the Court held, by failing to censure racial discrimination occurring on its property, a duty that the state cannot "ignor[e]" or "fail[] to discharge[,] . . . whatever the motive." [21]

28 U.S.C. § 1870 provides, "In civil cases, each party shall be entitled to three peremptory challenges." If the Congress had the poor judgment to enact a statute declaring, "Peremptory challenges may be used to excuse jurors on the basis of their race," there would be little doubt that the statute would be unconstitutional. This conclusion ineluctably follows from the decision in *Reitman v. Mulkey*,[22] in which the Supreme Court held unconstitutional California Proposition 14, an amendment to the State constitution permitting any person to decline to sell or lease property to another person "as he, in his absolute discretion, chooses," By adopting this amendment, the Supreme Court held, the state affirmatively sanctioned private discrimination as one of its basic policies. Interpreting 28 U.S.C. § 1870 to allow the exclu-

[20] *Ibid.*

[21] 365 U.S. at 725, 81 S.Ct. at 861.

[22] 387 U.S. at 371, 87 S.Ct. at 1629.

sion of jurors because of their race would condone conduct that could not be explicitly allowed.

That the statutory right to challenge jurors is exercised by a private litigant does not of itself make the action private. The government is intimately involved in the process by which a litigant challenges a prospective juror: the government summons the venire to appear in court at a particular time and place; the right to peremptory challenges is granted by a federal statute; the challenges are invoked in the course of a judicial proceeding, and on a facility operated by the government, usually in a federal courtroom or, for convenience, in the judge's chambers; they are not self-executing but are effected by the action of the judge; and the judge as government official acts in a court required by the Constitution to be open to the public which may thereby observe the court's toleration of the practice. The litigant exercises the peremptory challenge, but it is the judge, acting in a judicial capacity, who excuses the prospective juror.

Judicial oversight and administration of peremptory challenges thus involve more judicial process and government action than the amount found sufficient by the Supreme Court in *Lugar*, *Shelley*, *Tulsa Professional Collection Services*, and *Burton* to trigger state action. The Constitution that forbids judicial enforcement of covenants based on race equally prohibits judicial enforcement of peremptory challenges so motivated. The Constitution that forbids private parties to discriminate based on race through the use of a state nonclaim statute equally prohibits private parties from so discriminating through the use of a federal peremptory challenge statute. The Constitution that forbids a private restaurant on state-owned property to discriminate based on race equally prohibits a private party in a federal courtroom from so discriminating.

Responsible for impanelling the jury, the court, and hence, "the State[,] is not merely an observer of the

discrimination, but a significant participant. . . . The only thing the State does not do is make the decision to discriminate. Everything else is done or supplied by the State," [23] a New York state judge observed. By presiding over jury selection in his official, governmental capacity, a judge is intimately involved in the process that Tocqueville termed America's "greatest advantage" in "rub-[bing] off th[e] private selfishness which is the rust of society." [24] By carrying out his duties in a way that permits peremptory challenges based on race, the rust of the judge's approval of discrimination rubs off onto society, corroding the national character by giving private prejudice the imprimatur of state approval.

Justice would indeed be blind if it failed to recognize that the federal court is employed as a vehicle for racial discrimination when peremptory challenges are used to exclude jurors because of their race. The government is inevitably and inextricably involved as an actor in the process by which a federal judge, robed in black, seated in a paneled courtroom, in front of an American flag, says to a juror, "Ms. X, you are excused." A litigant's decision to provoke the court's action by virtue of a statutorily accorded right does not disguise the official governmental character of the procedure as a whole.

IV.

There are manifest differences between the nature of a criminal prosecution and a civil action, and the degree of governmental involvement in each. In a criminal prosecution, the government, state or federal, initiates the proceeding against an unwilling defendant. The government is the prosecutor, and the full weight of the state's panoply of personnel and resources is brought to

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[23] *People v. Gary M*, 138 Misc.2d 1081, 526 N.Y.S.2d 986, 994 (1988).

[24] Tocqueville, Democracy in America (Vintage Books: 1831/1945) Vol. I., 295-96.

bear against the accused. In a civil matter to which the state is not a party, the plaintiff initiates the proceeding and private parties are matched against each other. The state provides but the forum and the rules.

Neither the equal protection clause nor the rationale of the *Batson* case, however, is limited to the state's involvement in criminal prosecutions. The principle of equal protection applies to governmental action in civil as well as criminal matters, federal as well as state.[25] While the Supreme Court in *Batson* considered only a defendant in a criminal case, its guiding precept is that a " 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.' " [26] The "central concern of the Fourteenth Amendment" the Court affirmed, "was to put an end to governmental discrimination on account of race." [27]

The *Batson* court's holding that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure" [28] applies to civil no less than criminal proceedings. The *Batson* court itself provides the explanation: "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try," [29] or, we add, the private litigant whose dispute they are called to adjudicate. "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impar-

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[25] *Bolling v. Sharp, supra*, n. 9.

[26] *Batson*, 476 U.S. at 84, 106 S.Ct. at 1716, quoting *Swain v. Alabama*, 380 U.S. 202, 203-204 85 S.Ct. 824, 826-27, 13 L.Ed.2d 759 (1965), and citing as authority at n. 3 14 other Supreme Court decisions.

[27] *Id.*, 476 U.S. at 84, 106 S.Ct. at 1716.

[28] *Ibid.*

[29] *Id.*, 476 U.S. at 85, 106 S.Ct. at 1717.

tially to consider evidence presented at a trial. A person's race simply 'is unrelated to his fitness as a juror' . . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." [30]

The peremptory challenge occupies as important a position in the trial procedure of civil as it does in the procedure of criminal cases. Racial prejudice has no more place in the federal courtroom on the days the court is conducting a civil trial than it does on the days when the same judge, seated at the same bench, in the same courtroom, is conducting a criminal trial.[31]

Three federal courts have considered the applicability of *Batson* to civil proceedings. The Eighth Circuit Court of Appeals expressed "strong doubts" that *Batson* is limited to criminal cases, yet left the question for another day.[32] In *Esposito v. Buonome*,[33] a district court case, Circuit Judge Meskill, sitting by designation, held that *Batson* was not controlling in a § 1983 action, citing the distinction between civil and criminal cases without expressly deciding whether the exercise of peremptory challenges in a civil case involves governmental action. The court's reasons for distinguishing *Batson*, however, suggest that the decision was based on Judge Meskill's conclusion that the litigant had not demonstrated governmental action.

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[30] *Id.*, 476 U.S. at 85-9, 106 S.Ct. at 1717-18 (citations and portions of text omitted).

[31] *See Maloney v. Washington*, 690 F.Supp. 687, N.D.Ill., Memorandum Opinion, vacated on other grounds, *Maloney v. Plunkett*, 854 F.2d 152 (7th Cir.1988).

[32] *Wilson v. Cross*, 845 F.2d 163, 164 (8th Cir.1988).

[33] 642 F.Supp. 760 (D.Conn.1986).

A district judge in the same district court, however, reached the opposite result in *Clark v. City of Bridgeport*,[34] holding that "the equal protection analysis enunciated in *Batson* pertaining to use of peremptory challenges applies not only to criminal cases but also to civil cases" [35] in which a state agency is a party and an assistant city attorney exercises the peremptory challenge on behalf of a city.

If we were to limit *Batson* to criminal cases, we would betray *Batson's* fundamental principle: the state's use, toleration, and approval of peremptory challenges based on race violates the equal protection clause. We, therefore, hold that the principle announced by the Supreme Court in *Batson* applies to civil cases as well.

V.

As the Court observed with regard to the award of child custody in *Palmore v. Sidoti*,[36] "[I]t would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated." Judges do not inhabit an ivory tower. Like others, we know that some members of any racial group acting as decision-makers in a dispute between a person of their own race and a person belonging to another race may tend to favor those who are like themselves over those who are different. This is prejudice, and that humans are prejudiced, however unworthy that emotion, cannot be denied.

In a contest, therefore, between persons of different races, advocates may have a strategic reason to seek the discharge of veniremen of the opposing litigant's race. The potential pervasiveness of racial prejudice and its influence on advocates' efforts to find a favorable audience is evinced by Edmonson himself who exercised,

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[34] 645 F.Supp. 890 (D.Conn.1986).

[35] *Id.*, 645 F.Supp. at 896.

[36] 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984).

without objection from Leesville, all of his challenges against white jurors. The Constitution, however, condones neither the possible prejudice nor the equally racially-motivated attempt to escape presumed prejudice, which is itself a form of stereotyping. "The Constitution cannot control such prejudices but neither can it tolerate them," the Supreme Court stated in *Palmore*. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[37] If racially-motivated challenges are exercised by both parties, the remedy is not to condone them but to insist, when objection is made, that the guarantee of equal protection against all racial prejudice is enforced.

Our holding does not convert the right to exercise a peremptory challenge into a requirement that it be for cause. The peremptory challenge, as its very name implies, may be exercised for no reason at all, or for any reason, however capricious or whimsical, save to violate the Fourteenth Amendment: it may not be exercised to exclude a prospective juror because of race.

VI.

As we have noted, Edmonson established that he is a member of a cognizable racial group and that Leesville exercised peremptory challenges to remove members of his race from the venire. Leesville seeks to avoid the inference of discrimination by asserting that it did not challenge one black person who did indeed sit on the jury. That one black person was acceptable to Leesville does not negate the possible inference that Leesville used two of its three challenges to remove black jurors because of their race in order to try its case before a jury with eleven white members.[38]

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[37] *Ibid.*

[38] *See United States v. Battle*, 836 F.2d 1084, 1085-86 (8th Cir. 1987); *United States v. Clemons*, 843 F.2d 741, 746 (3d Cir.1988); *Stanley v. Maryland*, No. 82-1987 (Md.Ct.App.1988); *State v. Brinkley*, 42 Cr.L., 2145, 48 (Md.Ct.App.W.Dist.1987). *But see State v. Vincent*, 42 Cr.L. 2277 (Md.Ct.App.E.Dist.1988).

Whether or not Edmonson has established a prima facie case of racial discrimination, however, is a question for the district court in the first instance. The district court stated that it observed "no discrimination, no violation of the law in the selection *procedure*."[39] Reading this statement in context, we do not find that the district court determined, as *Batson* requires, whether, under the specific circumstances, Edmonson had established a prima facie case. We follow *Batson's* lead, and remand the case for further proceedings. If Edmonson should establish a prima facie case, then the district court must require Leesville to show that it had some neutral, that is, non-racial, reason for its challenges. If Leesville does not then come forward with a neutral explanation for its action, the district court shall order a new trial.

The case is REMANDED for further proceedings consistent with this opinion.

GEE, Circuit Judge, dissenting:

The sweeping result in today's case seems to me so unfortunate that I cannot join in it, even though the most dubious features of the majority opinion derive, not from the reasoning of my brethren, but from earlier decisions of the Supreme Court. Indeed, it may be arguable that—given those decisions—this result is unavoidable. Even so, because its effect is to impair severely the utility of a venerable and useful procedural device, for reasons that seem to me misguided, I voice a brief dissent. Long writing seems needless in any event, since it is unlikely that the Court will leave such an issue as this dangling.

The first subsidiary issue posed by the majority in the body of the opinion is "whether the exercise of peremptory challenges by a private litigant in a civil action

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[39] Trial Transcript at 61 (emphasis added.)

pending in federal court is a government action." (Ms. op. 4). One would think that to state the issue in this manner would be to answer it: unlike the prosecutor in *Batson*,[1] counsel in this case and his client are private parties, as are their adversaries, and the court took no part beyond permitting venire members dismissed by counsel to depart. Under the two-part test enunciated by the Court in *Lugar*,[2] however, it would be difficult to maintain that the strikes exercised by counsel in this case did not constitute "the exercise of a right or privilege having its source in state authority." 457 U.S. at 939, 102 S.Ct. at 2755.

It seems far more doubtful, however, that the second prong of the test is satisfied: that private counsel, striking the venire in a civil case, is a "state actor." *Ibid.* Indeed, if a public defender employed by the state is not such an actor, as the Supreme Court held in *Polk County v. Dodson*,[3] it seems clear that privately-retained counsel is not. This leaves as the requisite state actor only the trial judge, who performs the merely ministerial function of excusing the veniremen cut by counsel from further attendance in the case. It is difficult to conceive of a more minimal involvement than this—one which requires the exercise of no judgment or discretion, one which consists of nothing more than permitting the excused to depart. I would not hold that this mere standing aside constitutes "action," especially in view of such Supreme Court pronouncements as that found in *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982), that "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must . . . be deemed that

[1] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[2] *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

[3] 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

of the state" and that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the . . . Fourteenth Amendment."

In *Batson*, the state actor was the prosecuting attorney, the very embodiment of the state, exercising its power and acting in its interest in all respects. In today's case, no such figure is to be found: only private counsel, who holds no state post, and the trial judge, who took no action of any significance. I would not find state action here.

Nor can I agree that exercising strikes in a given case along ethnic lines necessarily involves or gives the appearance of involving derogatory racial views, as does the attempt to exclude black jurors generally from the venire. As Judge Garwood explained for our en banc Court, in a celebrated passage quoted by then Chief Justice Burger in his *Batson* dissent:

> "Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) . . . has made the general determination that those excluded are unfit to try any case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed litigants in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that particular case than others on the same venire.
>
> "Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclu-

> sion bespeaks a priori across-the-board unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority*, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not."

United States v. Leslie, 783 F.2d 541, 554 (5th Cir.1986) (en banc), quoted at 476 U.S. 79, 122-23, 106 S.Ct. 1712, 1736-37, 90 L.Ed.2d 69 (1986).

Finally, I am unable to avoid the conclusion that first the Supreme Court, with its decision in *Batson*, and now our panel, with today's case, have leapt halfway across a logical chasm and come to rest in midair. The essence of a peremptory challenge is that it need not be excused or justified; indeed, the challenger himself may *have* no articulable reason for his action. Every lawyer who has tried cases for any length of time knows this, would be forced to admit, if pressed, that on occasion he has exercised strikes on no firmer basis than "I didn't like the way he looked at my client" or "Her tone of voice didn't sound right." Hunches, implicit feelings, even crochets—some always strike barbers, or housepainters, or ironworkers—are the stuff of peremptory challenges. But who would credit such a reason, if advanced as the basis for challenging a member of an ethnic minority? Nor does equal opportunity for members of the various ethnic groups to serve as jurors result from today's decision, rather the contrary; for counsel may well think twice about lodging a challenge for which he must possess (or invent) suitable, rational reasons, as opposed to one for which he need produce none.

What remains after today's holding is not the peremptory challenge which our procedure has known for dec-

ades—or not one which can be freely exercised against all jurors in all cases, at any rate. Justice Marshall would dispense with strikes entirely, and perhaps this will be the final outcome. *Batson*, 476 U.S. at 106-8, 106 S.Ct. at 1728-9 (Marshall, J., concurring). In this much at least he is surely correct, that we must go on or backward; to stay here is to rest content with a strange procedural creature indeed: a challenge for semi-cause, exercisable differentially as to jurors depending on how the ethnic group to which they belong correlates with that of the striker's client—a skewed and curious device, exercisable without giving reasons in some cases but not in others, all depending on race.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4804

(Title Omitted in Printing)

ON SUGGESTION FOR REHEARING EN BANC

(Opinion December 5, 1988, 5 Cir., 1988, —— F.2d ——)

(January 23, 1989)

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, and DUHE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title Omitted in Printing)

Before CLARK, Chief Judge, WISDOM, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

March 1, 1990

Issued as Mandate: Mar. 23, 1990

Judges Politz and Higginbotham specially concur. Judge King concurs in the result. Judges Wisdom, Rubin, Johnson and Williams dissent.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

(Title Omitted in Printing)

March 1, 1990

Before CLARK, Chief Judge, WISDOM, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.[1]

GEE, Circuit Judge:

Today we decide whether a private litigant in a federal civil case who challenges a venire member peremptorily can be made to give reasons for his action. Specifically, we must determine whether he can be required to do so when his opposing party is a black person and the venireman stricken is black, so as to rebut the inference that he exercised the strike because of the would-be juror's ethnic group.

The Supreme Court has imposed such a requirement in criminal prosecutions of black defendants, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); and in partial reliance on that decision a panel of our court has extended the principle to this civil damage suit by reversing the trial court, which had held that such a rule does not obtain a civil litigation. *Edmonson v. Leesville Concrete Co., Inc.*, 860 F.2d 1308 (5th Cir.

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[1] Senior Judges Wisdom and Rubin were members of the original panel and sit on the en banc court for that reason, Judge Rubin having assumed senior status since the panel opinion was handed down.

1988). We now reconsider that decision en banc and affirm the trial court.

We do so for two reasons: the mechanical one, that state action is not present in such a case as this; and the logical one, that striking a venireman in a civil case because you fear he may tend to favor your opponent over you neither demeans him nor calls in question the fairness of the civil justice system.

Facts

The panel opinion states the relevant facts succinctly:

> Injured in an accident on a construction job at Fort Polk, Louisiana, a federal enclave, Thaddeus Donald Edmonson, a 34-year-old black male, sued Leesville Concrete Company for negligence in federal district court. The case was tried to a jury.
>
> Edmonson used all three of his peremptory challenges to excuse members of the venire who were white. Leesville challenged peremptorily two prospective jurors who were black and one who was white. Citing *Batson*, Edmonson asked the district court to require Leesville to articulate a neutral explanation for the manner in which it had exercised its challenges. The district court denied the request on the ground that the *Batson* ruling did not apply to civil proceedings, and then proceeded to impanel a jury composed of eleven white jurors and one black juror. The jury rendered a verdict for Edmonson, assessing his total damages at $90,000, but because it found him 80% contributorily negligent, awarded him only $18,000. Edmonson seeks a new trial because of Leesville's alleged racial discrimination in its exercise of peremptory challenges.

Id. at 1309-10 (footnote deleted).

The Peremptory Challenge: 1066 A.D. through Swain

The history of the peremptory challenge in felony cases stretches back many hundreds of years to the roots of the common law. That history, both in England and in our Country, is reviewed with painstaking thoroughness by Justice White in his opinion for the Supreme Court in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). To his account we neither can nor need add anything; we merely repeat his relevant conclusions here for the reader's convenience:

(1) "The use of peremptory challenges is of ancient origin and is given in aid of the party's interest in having a fair and impartial jury." Wright & Miller, Federal Practice & Procedures: Civil § 2483, at 473 (citing to *Swain*, 380 U.S. 202, 217, 85 S.Ct. 824, 834, 13 L.Ed.2d 759 (1965).

(2) "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. . . . It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another. . . .' It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." 380 U.S. at 220, 85 S.Ct. at 835.

(3) "The presumption [that the prosecutor is using the State's challenges to obtain a fair and impartial jury] is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand, all Negroes were removed from the jury *or that they were removed because they were Negroes. Any other result,*

we think, would establish a rule wholly at odds with the peremptory challenge system as we know it." 380 U.S. at 222, 85 S.Ct. at 836 (emphasis added).

(4) Where, however, it is shown that peremptories are being used to serve the purpose of generally disqualifying blacks as jurors on a racial basis, relief can be had.

A vigorous dissent, written by Justice Goldberg and joined by Chief Justice Warren and Justice Douglas, would have extended the holding of *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), to cover the situation presented by *Swain*, taking the view that a sufficient showing had been made that the strikes in question were exercised, not with reference to the outcome in the particular case, but for the purpose of denying to black citizens the same right to participate in the administration of justice as whites enjoyed.[2] 380 U.S., at 229, 85 S.Ct. at 840 *et seq.; see also United States v. Leslie*, 783 F.2d 541, 545-46 (5th Cir. 1986) (en banc), vacated and remanded, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987).

And so matters rested for twenty years. During these, the Equal Protection Clause was thought to bar any general or systematic disqualification of black citizens as veniremen on any notion of supposed incapacity or inferiority, but—as *Swain* explicitly noted—to permit them to be cut from a jury panel by peremptory challenge for any reason or for no reason, just as any other person might be struck. In essence, the peremptory could be exercised on any ground whatever, including race, that was directed and limited to seeking a given result in a particular case. Only when the challenge could be shown to have been employed as a device to eliminate blacks

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[2] *Strauder* invalidated a state law limiting eligibility for jury service to white males.

from jury service generally was it vulnerable to constitutional attack under *Swain*.

Batson

A little over three years ago, in *Batson v. Kentucky*, *supra*, the Court acted for the first time seriously to trammel the use of the peremptory challenge to strike black veniremen in the criminal prosecution of a black.[3] James Batson, a black male, was indicted for burglary and receiving stolen goods. Because the prosecutor struck all four black persons on the venire, Batson was tried by an all-white jury and convicted. His Sixth and Fourteenth Amendment objections unavailing, he sought and got relief from the Supreme Court. The form which it took, however, was a reaffirmation of the root principle of *Swain*—that systematic exclusion of black jurors from trying black defendants in criminal cases infringes the rights of both—but a revision to lighten the evidentiary burden announced in *Swain*.

Justice Powell's opinion in *Batson* therefore observes that "[a] number of lower courts following the teaching of Swain reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause."[4] 476 U.S., at 92, 106 S.Ct., at 172. (footnote deleted). Disapproving this very high standard of proof, which by hindsight it correctly characterized as "a crippling burden"[5], the

[3] The Court's citation to *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977) implies, however, and the general wording and tone of *Batson* further indicate, that the ruling is not limited to black citizens.

[4] With deference, this is scarcely surprising in view of the presence in *Swain* of such statements as "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." 380 U.S., at 221, 85 S.Ct., at 836.

[5] For essentially the reasons set out by our Court in *United States v. Pearson*, 448 F.2d 1207, 1217 (5th Cir.1971).

Court laid out a less demanding, two-step process of proof. First, a prima facie showing by the defendant of discrimination against veniremen of his race; second, a coming forward by the state with a neutral explanation for each of its peremptory challenges to veniremen of that race. The Court is at pains, moreover, to make plain that an assumption of partiality on the mere basis of shared race will not do as such an explanation.[6] 476 U.S., at 97, 106 S.Ct., at 1723. Thus the law of strikes in criminal cases. Should it be extended to civil ones?

State Action?

This issue is accurately stated by our panel as: "[W]hether the exercise of peremptory challenges by a private litigant in a civil action pending in federal court is a government action, to which the Fifth Amendment

[6] There are at least two reasons why a prosecutor might strike a black venireman called in the prosecution of a black defendant: the notion that black citizens are inherently unfit to serve as jurors, as per the statute invalidated in *Strauder*, or a belief that a black person may tend to favor members of his own ethnic group. The former is demeaning; the latter is not—although a belief in such a proposition is almost surely irrational, in view of the common knowledge that in our nation blacks both commit and suffer disproportionately from criminal violence. Thus, it seems plain, the law-abiding black citizen is scarcely likely to be indulgent toward *any* criminal, black or white—rather the contrary. See Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan.L.Rev. 545, 553-54 (1974-75).

At all events, the *Batson* Court appears to have concluded that since the latter, undemeaning reason for challenge cannot in practice be separated from the former, neither can be countenanced. Clearly, the reasoning supporting the Court's new posture on proof of race discrimination in jury strikes would apply equally to strikes based on religious affiliation, nationality, and the like. Equally clearly, such an extension would likely complicate the process of exercising peremptory challenges to such an extent that issues arising from it would at last wag those of guilt or innoence, thus effectively spelling the end of strikes in criminal cases. Indeed, Justice Marshall, in a separate concurrence, contends for just such a result. 476 U.S., at 107-8, 106 S.Ct., at 1728-9.

applies, or a private action, which the Constitution does not reach." 860 F.2d, at 1310. The answer to it is dispositive of the appeal; for if governmental action is not present, then the courts hold no warrant to interfere, in the name of equal protection, with the system of civil peremptory challenges.[7]

Our inquiry is assisted by the two-step test laid down by the Supreme Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982), for assaying the presence or absence of state action. The first requirement is clearly present here: that the claimed deprivation has resulted from the exercise of a right or privilege having its source in governmental authority. The second, however, seems equally clearly to be wanting: the presence of some figure who can fairly be characterized as a state actor.

In *Batson*, no such doubt arose: there the entire proceeding was commenced and carried through by the prosecuting attorney, the very embodiment of the state's power, acting in the direct interest of its most fundamental function, maintaining law and order. In today's case, no such figure is present; and only two conceivable candidates present themselves: the trial judge and the private defendant's trial attorney.

The notion of trial judge as "state actor" need not detain us long. In the first place, as the Supreme Court observed in *Swain*—factually and not in such a manner as to be subject to overruling by *Batson*—the peremptory challenge "is one exercised . . . without being subject to the court's control. . . ." 380 U.S., at 220, 85 S.Ct., at 835. The merely ministerial function exercised by the judge in simply permitting the venire members cut by

[7] Indeed, as Part II of the panel opinion correctly notes, the Constitution says nothing of equal protection as regards acts of the federal government. The Supreme Court has, however, repaired this omission by implication. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

counsel to depart is an action so minimal in nature that one of less significance can scarcely be imagined.[8] No exercise of judicial discretion is involved, rather a mere standing aside; so that the fault—if it is a fault—lies with the system which permits such challenges, not with the judge's mere ministerial compliance with what the rule requires.[9] Finally, it is hard to see how the Supreme Court could have reserved judgment, as it purported to do in *Batson*, on the strikes by defense counsel, if the "actor" was the judge. 476 U.S., at 89 n. 12, 106 S.Ct., at 1719 n. 12. If the judge is the actor, then, and if his mere excusing of veniremen who have been peremptorily challenged from further attendance at court be deemed an "act," it follows that every aspect of every civil trial, state and federal, is constitutionalized—a quantum pro-

[8] To hold that this constitutes "action" would require our disregarding expressions of the Court such as that found in *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982), that a government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must . . . be deemed to be that of the State" and that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible . . . under the . . . Fourteenth Amendment." (citations omitted). See also *Evans v. Abney*, 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970) (giving indirect effect to private person's discriminatory intent not state action for equal protection purposes.)

[9] An example of such a system, which, as it involves the state itself requires the presence of no "state actor," is to be found in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), invalidating state replevin laws as violating due process for want of a hearing before chattels could be repossessed. Such a legal system, if used at all in the manner specified by the state, would necessarily involve unconstitutional actions. The system of peremptory challenges, by contrast, specifies no unconstitutional actions but is at most—and like most systems—subject to improper use by one disposed to do so. *Batson*, 476 U.S. at 96, 106 S.Ct. at 1722.

cedural leap that we leave for the Supreme Court to make, should it wish to do so.

As for private counsel, it is inconceivable to us that a privately-retained lawyer, serving a private client in a damage suit such as this, should be viewed as a state actor.[10] Clearly he cannot be, at any rate, so long as the 1981 Supreme Court holding stands that even a public defender, paid by the state, in a criminal proceeding against an indigent defendant is not. *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). Nor, common sense tells us, does private counsel partake of such a character. True, he is licensed by the State; not, however, for its benefit but in the hope of insuring a minimum degree of competence to his clients. Like the public defender, it is *their* interests, their partisan interests, which he serves; and where their proper and lawful interests and those of the State come into conflict, he hews to those of his client in every instance—and properly so. Nor is the interest of the state by any measure so deeply involved in civil litigation between private parties in its own courts as in criminal litigation there: in the former case it simply furnishes a level playing field for dispute resolution in the name of civic peace, in the latter it is the instigator and actor, with powerful interests of its own at stake. Nor can it be said that private counsel in a civil damage suit performs a "public function." [11]

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[10] We have no occasion to consider the situation presented where the state appears as a civil litigant.

[11] See *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953). In *Terry*, the Supreme Court held the Jaybird party, a private political organization which excluded blacks from its nomination balloting, to be a state actor. Although the jury selection process, like the election process, involves both private and state action, the traditional roles of private counsel and the state have remained discrete in this case. The present situation is thus distinguishable from that in *Terry*, in which the nomination process of the Jaybird party was found to be "an integral part, indeed the only effective part, of the [entire] elective process." *Id.* at 469, 73 S.Ct. at 813.

And so, since it appears to us that no state actor is present on the scene of today's case, we conclude that Constitutional considerations are not implicated. So much for the mechanical application of precedent; we turn in closing to a few underlying considerations of logic and policy.

Strikes in Practice

A function of strikes is to allow the parties to participate to some degree in the selection of the jury that is to try their case, to the end that each may not only have, but perceive that he has had, a fair and impartial trial. It is certainly maintainable that this function is of greater significance in federal court proceedings than in most, for there the attorney's role in jury selection is perhaps at its nadir among American jurisdictions. Ordinarily, for example, counsel does not there address the venire; and his other functions are correspondingly reduced in this aspect of trial.

It is proverbial that strikes are exercised on diverse bases: to remove the venireman whom counsel thinks the court should have excused for cause or, occasionally, in the case where counsel is allowed to interrogate the venire, the venireman whom he perceives that he has seriously offended by his questions. But even more tenuously, strikes are exercised to excuse anyone who simply did not sit right with counsel ("I didn't like the way she looked at my client"), or whom he feels might for *any* reason have a predisposition toward the other side, or an aversion to his own. The literature on this subject, it being one familiar only to trial lawyers—a group not noted for its special devotion to scholarly writing—is sparse, but see Sutin, The Exercise of Challenges, 44 F.R.D. 286 (1967); Babcock, Voir Dire; Preserving "Its Wonderful Power," 27 Stan.L.Rev. 545 (1975). At any

rate, every lawyer with substantial trial experience knows that he has often exercised strikes for which he could articulate no clear reason even to himself, but which he desperately wished to exercise. And at all events, a procedural device of such great age and broad acceptance as the civil peremptory challenge should require little defense: clearly, for a long time, and in jurisdiction after jurisdiction, it has been found to serve useful purposes. We should therefore avoid tampering with its essential feature, the absence of a requirement to give reasons for its use, unless either the reasoning or the authority of *Batson* requires that we do so. Because, despite their superficial similarity, the true contexts of the criminal prosecution and the civil trial are greatly different, we conclude that neither does.

To begin with, and as we note briefly above, the government is directly involved in the criminal prosecution, appearing in the person of one of its central figures, the prosecutor—without whose will it cannot be brought and upon whose performance as its central actor all depends. His role has no counterpart in civil litigation, for in this respect his will *is* the will of the State. But, more fundamentally, the entire purpose of a criminal prosecution is to enforce the purposes of the state, whereas the state has no purpose at all in civil litigation beyond preempting the use of private force to settle disputes—a purpose that is as well served, if the parties consent, by an arbitration to which the state is no party. Finally, in a criminal prosecution the jury serves in some real sense as, not only a safeguard against, but an instrument of, the state's power. Once invoked, its collective will is sovereign as to guilt or innocence and, sometimes, even as to life or death. For these reasons, we do not believe that a court proceeding so cautiously as did the Batson court, one which was careful to point out that its holding did not extend even to the exercising of peremptories by defense counsel in a criminal case, would have intended by

that decision's authority to dictate our result today. 476 U.S., at 89 n. 12, 106 S.Ct., at 1719 n. 12.

Nor do we think that the Court's reasoning does so. As we have observed above, Justice Powell's opinion in *Batson* expressly states that its scope is limited to a reexamination of "that portion of Swain . . . concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race" from the jury. 476 U.S., at 82, 106 S.Ct., at 1714 (citation omitted).[12] In all other respects, *Batson* simply reaffirms *Swain*'s holding that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 476 U.S., at 84, 106 S.Ct., at 1716, quoting *Swain*, 380 U.S., at 203-4, 85 S.Ct., at 826-7. This is, however, a far cry from the proposition advanced by Mr. Edmonson in today's case, which can fairly be stated as

> Whenever a private litigant sued for damages by a black plaintiff strikes a black venireman, he can be required to give a reason other than their common ethnicity for having done so.

For several reasons, we do not believe that the considerations underlying *Swain* or the reasoning upon which it rests support such a proposition as this.

To begin with, the informing principle of the *Strauder-Swain-Batson* line of decisions is that black citizens cannot, as a matter of Constitutional law, be barred from full participation in the administration of criminal justice as jurors. *Strauder*, of course, involved an example of the most overt of such attempts to do so: an exclusion of blacks by statute from the entire venire summons process. As Judge Garwood, writing for our en banc

[12] The Court expressed no view on Batson's Sixth Amendment arguments. 476 U.S., at 84 n. 4, 106 S.Ct. at 1716 n. 4.

court, has noted, such an exclusion is racially demeaning. *United States v. Leslie*, 783 F.2d 541, 554 (5th Cir.1986) (en banc), vacated and remanded, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987). *Swain* and *Batson* were concerned with use by the state of peremptory challenges to accomplish the same purpose in a more roundabout way: to remove black veniremen from the case simply because they were black, the decisions differing from each other solely on the manner of proof, but agreeing in principle. And that principle, to reiterate it, is that neither directly nor indirectly can black citizens be denied the opportunity for criminal jury service on racial grounds alone. The reason underlying the principle is that the Constitution does not permit unequal treatment of citizens on the ground of race and will not entertain—because it is insulting—even the suggestion that one is unfit to discharge a civic duty for such a reason.

This is a far cry, however, from striking a black venireman for particular reasons in a particular case, even for reasons having to do with his race. To take a few examples, for obvious reasons counsel representing a defendant airline in a damage suit might well peremptorily challenge a black airline pilot who was himself on strike for higher wages against another airline. Such a challenge, based on an assumed situational animosity toward his client, clearly raises no equal protection problems, even though the venireman stricken is black. To take a closer case, however, one may well imagine that counsel defending a well-known member of the Ku Klux Klan in an action for, say, breach of contract by a white plaintiff might strike any black veniremen whom he had been unable to convince the judge to excuse for cause, not because of any notion of ethnic inferiority, but rather on the prudential ground of probable hostility, ineradicable despite the subject's best efforts. Such an action does not demean the stricken subject; it merely recognizes a probable fact of life. And finally, (arguably) today's

case: counsel, representing a party opposing a black defendant, who strikes all blacks on the venire because he fears that they *may* be inclined—even if only ever so slightly—to favor one of their own. It seems to us very plain indeed that none of these strikes has been taken on a ground which is demeaning to its object.

As for the third example given, however, in *Batson* the Supreme Court clearly stated that such a reason must not be accepted for a strike in a criminal case:

> But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race. Cf. *Norris v. Alabama*, 294 US, [587] at 598-599, 79 LEd 1074, 55 SCt 579 [583-584]; see *Thompson v. United States*, 469 US 1024, 1026, 83 LEd2d 369, 105 SCt 443 [445] (1984) (Brennan, Jr., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, supra, [476 U.S.] at 86 [106 S.Ct. at 1717], 90 LEd2d, at 80, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the juror's race.

476 U.S., at 97-98, 106 S.Ct., at 1723-1724.

Thus, by Supreme Court mandate, in the criminal prosecution of a black defendant, it is as much a violation of equal protection for the prosecutor to strike a black venire-

man because he thinks he might be more inclined than another to favor such a defendant as it is to strike him because he views him as inherently unfit for service as a juror because of his race. More to the purpose, we think, than attempting to equate the two actions described in a recognition that to countenance such an explanation for such a strike would be to return to pre-*Strauder* days and permit the prosecutor in such a case, having thought up a new set of arguments for doing so, to strike a black venireman merely because he is black. The Court's result is, therefore, explicable on practical grounds in the context of criminal prosecutions. We think it would be much less so, however, in civil actions for damages between private parties—such as this one.

In a civil suit, unlike a criminal prosecution, the state itself takes no action on its own behalf that could be viewed as exhibiting official prejudice. It is, we think, a sound policy that requires the state to conform to stricter standards and appearances in dealing with its citizens than are demanded of those citizens in their dealings with each other. As an illustration, we need look no further than Justice Sutherland's often-quoted language in *Berger v. United States:*

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, at 88, 55 S.Ct. 629, at 633, 79 L.Ed. 1314 (1935).

But more fundamentally, vastly different things are at stake in criminal trials and as regards the criminal jury than where civil trials and civil juries are concerned. The criminal jury is a central feature of the criminal justice system, where liberty and even life are at stake. It holds not only fact-finding powers but, because of the Double Jeopardy Clause, the de facto power to pardon. As to the criminal jury, then, we can see how the Court might strike the balance which it did in *Batson* between the actuality or even the appearance of racially motivated strikes and the "any reason or no reason" rule for peremptory challenges that has come down to us from the common law.

The civil jury, on the other hand, serves a fact-finding function only, and the issues before it are, generally speaking, limited to economic ones. To be sure, it is part of the civil justice system just as its criminal counterpart is part of the criminal one; but its function is far less pivotal and central even to civil litigation than that of a jury in a criminal case is to criminal justice. Private counsel, in striking such a jury, has in mind a simple imperative, far removed from that which should motivate the prosecutor.

For the prosecutor's aim is justice. He wins when justice is done and—although it is surely not the outcome he envisions—when it becomes apparent during the trial of a criminal case, a la the celebrated fictional career of Perry Mason, that the accused is innocent of the crime with which he stands charged, the prosecutor has not "lost."

It is otherwise with the civil advocate. His client is in a quarrel, and he is in a fight. The fight may be a more or less genteel one, conducted in an ethical fashion to be

sure; but it remains a fight nonetheless: one which, unless settled, will be won by one side of the contest and lost by the other. It is the first imperative of the civil advocate to see that it is his side that wins.

As with all other aspects of his case, counsel brings that proper concern to striking the jury; and, because of it, in doing so he follows one precept and one only: by all fair means, to get a jury which, given his foreknowledge of the case, he believes will in the end be more naturally disposed to favor his side of the dispute than that of his opponent. Within the limits of fair and ethical conduct, his sole concern is, quite properly, that his client gain the case. In such a context as this, we see no occasion to inquire into counsel's motives for his strikes or, at any rate, none that outweighs the value of leaving the common-law peremptory challenge system in undiminished effect. If counsel is astute, he will recognize the obvious truth that there are ordinarily more affinities between a black C.P.A. and a white C.P.A. than there are between a white C.P.A. and a white longshoreman. But even if he is obtuse, it remains that he is only a private person acting obtusely: one for whose actions the state is neither actually nor apparently accountable. That it stands aside, neither approving nor disapproving his actions, and permits him to exercise his three strikes for any reason, for no reason, or even for a bad reason does not implicate the state in his conduct.[13]

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[13] We note that even if blacks are stricken for an improper reason, the fairness of the civil justice system to the individual litigants would not be compromised. The appellant does not allege, nor could he credibly do so, that he is unable to receive fair consideration from a jury which has only one black in its ranks. Indeed, if a fair cross-section of the community were essential to the proper functioning of the jury, "we would take steps to more nearly ensure that the composition of each individual jury roughly mirrored the community's group mixture." *United States v. Leslie*, 783 F.2d 541 (5th Cir.1986), *vacated*, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987). We see no need for such action at present and do not read *Batson* as requiring it. See *Batson*, 476 U.S., at 85 n. 6, 106 S.Ct., at 1716 n. 6 ("it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society").

Finally, when the civic concerns which underlie the *Strauder* line of cases are removed or greatly lessened, as they are when we shift from service on the criminal jury to service on the civil one, it remains true that the traditional peremptory strike is a leveller of the playing field. It is exercisable against any venireman, high or low, black or white, rich or poor, and without specifying a reason. Thus the peremptory, as traditionally constituted, is a device tending more to equal treatment of all the venire than the strike as reconfigured in *Batson*, which requires counsel to possess (or invent) an articulable reason other than race for challenging a black venireman when a black defendant is being prosecuted, but none for challenging a white one. Thus while he can strike a white venireman for an honest but inarticulable reason—or for a silly one: some always strike barbers; others, housepainters—he must give a reason if he strikes a black one.[14] It is not for us to quarrel with the Supreme Court's *Batson* reconfiguration of the peremptory, but we decline to extend its strictures on this ancient right into the civil area, where the considerations on which *Batson* is based are, if present at all, far weaker than in the criminal field.

The judgment of the district court is therefore

AFFIRMED.

POLITZ, Circuit Judge, with whom PATRICK E. HIGGINBOTHAM, Circuit Judge, joins, specially concurring:

I concur in that portion of the majority opinion which concludes that there is no state action involved in the

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[14] Although it appears that an eccentric one will do. *See United States v. Romero-Reyna*, 889 F.2d 559 (5th Cir.1989) ("The P Rule").

exercise of peremptory challenges at issue in this civil action. I therefore join therein and in the affirmance of the trial court.

KING, Circuit Judge, concurs in the result.

ALVIN B. RUBIN, Circuit Judge, with whom WISDOM, JOHNSON and JERRE S. WILLIAMS, Circuit Judges, join, dissenting:

The issue before us is whether a party to a civil jury trial who has established a prima facie case that the opposing party is exercising his peremptory challenges to discriminate on the basis of race is entitled by the Constitution to require the challenger to express a reason for exercising the challenges other than racial bias and thus to explain why allowing the challenging jurors to be excused would not constitute a denial of equal protection of the laws. It is not, as the majority assumes, whether "striking *a* venireman in a civil case because you fear that *he* may tend to favor your opponent over you . . . demeans him [or] calls in question the fairness of the civil justice system." [1] It is not whether a litigant's exercise of peremptory challenges can be questioned because his lawyer likes or doesn't like the face of a prospective juror, trusts or distrusts fat people or skinny people, favors or disfavors intellectuals, prefers or disdains outdoor types.[2] It is about assuring equal protection of the laws in the face of evidence that the peremptory challenge has been used to deny that constitutional right.

Peremptory challenges were authorized and may be exercised for nearly any reason at all, or for none, for irrational as well as rational reasons. Such challenges

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[1] Majority slip opinion at 2459, at —— (emphasis added).

[2] Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U.Chi.L. Rev. 153, 200-01, 210-11 (1989).

are a vital part of trial by jury.[3] They are not, however, guaranteed any role by the Constitution,[4] and are fully subject to its dictates. *Batson v. Kentucky* [5] holds that if, in a criminal case, a prima facie showing is made that the prosecutor is exercising peremptory challenges because of the race of the challenged juror, the defendant may require the court to call on the prosecutor for an explanation so that the court may determine whether the challenges reflect the prejudice that the Fourteenth Amendment was adopted to extirpate. Nothing in the words or purpose of the equal protection clause restricts its application to criminal prosecutions. Accordingly, I would extend *Batson* to civil cases, and I respectfully dissent from the majority's refusal to do so.

I.

Batson does not permit a probe of the motive for every peremptory challenge. The defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of his race from the venire. Second, the defendant may rely on the indisputable fact that "peremptory challenges constituted a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" [6] The defendant must next show that these facts and any other relevant circumstances "raise an inference that the prosecutor used that prac-

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[3] *See Swain v. Alabama*, 380 U.S. 202, 212-20, 85 S.Ct. 824, 831-35, 13 L.Ed.2d 759 (1965).

[4] *See Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28-30, 63 L.Ed. 1154 (1919); *see also Batson v. Kentucky*, 476 U.S. 79, 91, 106 S.Ct. 1712, 1720, 90 L.Ed.2d 69 (1986) (citing *Stilson*); *Swain* 380 U.S. at 219, 85 S.Ct. at 835, 13 L.Ed.2d 759 (1965) (same); *Holland v. Illinois*, —— U.S. ——, ——-——, 110 S.Ct. 803, 806-810, —— L.Ed.2d —— (1990) (same).

[5] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[6] 476 U.S. at 96, 106 S.Ct. at 1723 (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)).

tice to exclude the veniremen from the petit jury on account of their race." [7] In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. The Court expressed "confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." [8]

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." [9] Although prosecutors may not rebut the defendant's case by merely claiming discrimination, alleging good faith, or stating the discriminatory judgment that black jurors would be more partial to the defendant because of his race, the explanation need not "rise to the level justifying exercise of a challenge for cause." [10] After receiving the State's explanation, the trial court "will have the duty to determine if the defendant has established purposeful discrimination." [11]

Every lawyer who has ever tried a case to a jury knows that peremptory challenges are in practice exercised for reasons that may range from suspicion that an individual venireperson may not favor one's cause to adherence to an idiosyncratic, irrational rule.[12] Federal courts are not inexperienced in evaluating action that is reprobated only if done for a specific reason but is per-

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[7] 476 U.S. at 96, 106 S.Ct. at 1723.

[8] 476 U.S. at 97, 106 S.Ct. at 1723.

[9] *Ibid.*

[10] 476 U.S. at 97-98, 106 S.Ct. at 1723-24.

[11] 476 U.S. at 98, 106 S.Ct. at 1724.

[12] *See, e.g., United States v. Romero-Reyna*, 889 F.2d 559 (5th Cir.1989) (The "P" rule).

mitted even if done for some other reason, however unfair, or for no reason at all. Thus we decide whether a state employee who has no property right in employment and is otherwise terminable at will has been discharged in retaliation for her exercise of First Amendment rights; [13] whether a private employee who is otherwise subject to discharge without cause has been fired in violation of the Age Discrimination in Employment Act; [14] and in general whether an unconstitutional or illegal purpose was a substantial factor in causing an otherwise valid action.[15]

The *Batson* test is demanding, requiring three specific steps of proof by the defendant before the challenger need utter a word and then permitting the challenger to explain if he wishes. The Supreme Court was careful to select a system of proof that steered between unfairly encouraging meritless claims and imposing a "crippling burden of proof," [16] one that courts had experienced and ably managed in a number of equal protection contexts.[17] The burden of proof of discrimination rests on the party who claims that he has been denied equal protection. Application of *Batson* to civil cases would not lead courts into a jury-selection morass, but would authorize a simple process readily administered by trial judges.[18]

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[13] *See, e.g., Perry v. Sinderman*, 408 U.S. 593, 596-98, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972).

[14] 29 U.S.C. § 621 *et seq; see, e.g., Trans World Airlines v. Thurston*, 469 U.S. 111, 124, 105 S.Ct. 613, 623, 83 L.Ed.2d 523 (1985).

[15] *See, e.g., Washington v. Davis*, 426 U.S. 229, 239-45, 96 S.Ct. 2040, 2047-50, 48 L.Ed.2d 597 (1976).

[16] 476 U.S. at 92, 106 S.Ct. at 1721 (citations omitted).

[17] 476 U.S. at 93-98, 106 S.Ct. at 1721-24.

[18] *Cf. Thomas v. Moore*, 866 F.2d 803, 805 (5th Cir.1989).

II.

The equal protection clause of the Fourteenth Amendment forbids "any State . . . [to] deny to any person within its jurisdiction the equal protection of the laws." [19] Plainly that clause applies to action by the government, including, by extension under the Fifth Amendment,[20] the federal government, and does not forbid private acts, absent Congressional invocation of the authority granted by Section 5 of the Fourteenth Amendment.

A.

Accordingly, the conduct allegedly causing the deprivation of a constitutional right must be "fairly attributable to the state." [21] To determine whether a deprivation is thus fairly attributable to the government, the Supreme Court in *Lugar v. Edmondson Oil Co., Inc.*, set forth a two-part test.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state [sic] or by a person for whom the State is responsible.[22]

The majority concedes, as does the defendant-appellee, that this test was met. *Lugar* continues:

> Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. With-

[19] U.S. Const. art. XIV § 1.

[20] *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

[21] *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482.

[22] 457 U.S. at 937, 102 S.Ct. at 2753.

> out a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.[23]

Explaining the Court's earlier decision in *Flagg Brothers, Inc. v. Brooks*,[24] the *Lugar* opinion illustrates the application of this second principle. Action by a private party pursuant to a statute "*without something more*" is not sufficient to justify a characterization of that party as a "state actor." But the " 'something more' . . . might vary with the circumstances of the case." [25] The Court referred to its own use in other cases of a number of different factors or tests in different contexts, referring to the "public function" test, the "state compulsion" test, the "nexus" test, and a "joint action" test.[26] The Court then reserved the question whether those tests are actually different in operation or are simply different ways of "characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation," [27] clearly recognizing that in either event the inquiry into the "something more" required for state action must be based on the specific facts and entire context of a given case. Concluding its summary of the law of state action for the purposes of the equal protection clause, the Court cited with approval the teaching of *Burton v. Wilmington Parking Authority* [28] that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement

[23] 457 U.S. at 937, 102 S.Ct. at 2754.

[24] 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978).

[25] 457 U.S. at 937, 102 S.Ct. at 2754.

[26] 457 U.S. at 937, 102 S.Ct. at 2754-55.

[27] *Ibid*

[28] 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

of the State in private conduct be attributed its true significance." [29]

Lugar itself is instructive, although the Court limited the extent of its holding [30] and considered the underlying commercial dispute as forming a private core to the conduct at issue.[31] A private creditor had alleged in an ex parte petition its belief that a debtor was disposing of or might dispose of his property in order to defeat his creditors. Acting on that petition, a clerk of the state court issued a writ of attachment that was then executed by the County Sheriff, effectively sequestering the debtor's property although it was left in his possession. The Court held that the creditor's joint participation with state officials was sufficient to characterize the creditor as a state actor for the purposes of the Fourteenth Amendment, the Court of Appeals having erred in "requir[ing] something more than invoking the aid of state officials to take advantage of state-created attachment procedures." [32]

In *Burton*, acknowledged by *Lugar* as addressing the second state-actor inquiry,[33] the Court considered the refusal of the operator-lessee of a restaurant located in a building owned by the state of Delaware to serve a black man. The restaurant's lease required that the space be used for the service of food and/or alcohol and constrained the lessee to abide by all applicable laws, but no state law or official commanded, authorized, or encouraged the lessee's discrimination. The Court found that the lessee was a state actor, as Delaware had "not only

[29] 457 U.S. at 939, 102 S.Ct. at 2755 (quoting *Burton*, 365 U.S. at 722, 81 S.Ct. at 860).

[30] 457 U.S. at 939 n. 21, 102 S.Ct. at 2755 n. 21.

[31] *See, e.g.*, 457 U.S. at 941-42, 102 S.Ct. at 2756.

[32] *Ibid.*

[33] 457 U.S. at 938 n. 19, 102 S.Ct. at 2754 n. 19.

made itself a party to the refusal of service, but ha[d] elected to place its power, property and prestige behind the admitted discrimination," thereby denying any characterization of the conduct as purely private.[34] The likeness to the exercise of racially discriminatory peremptory challenges in the marbled halls of the nation's courts need not be stressed.

Reitman v. Mulkey [35] considered what would initially appear to be a more extreme form of state authorization: a California statute that protected the absolute discretion of state property owners to refuse to sell, lease, or rent such property to any persons he might choose. The Court abided by the California Supreme Court's appraisal that the statute was intended to "authorize" private racial discrimination in the housing market.[36] No such intent can be ascribed to the origin of the statutory right to peremptory challenges. Nevertheless, if not constrained by *Batson*, the rules governing peremptory strikes vest absolute discretion in the parties. The state thereby guarantees the effect of an objection to seating an otherwise eligible juror by allowing no other to object in turn.

Notwithstanding the Supreme Court's warning in *Burton* that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted,' " [37] the majority considers today's decision to be bound by some controlling precept in the Court's previous decisions. If true, the controlling deci-

[34] 365 U.S. at 725, 81 S.Ct. at 862.

[35] 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967).

[36] 387 U.S. at 376, 381, 87 S.Ct. at 1631, 1634.

[37] 365 U.S. at 722, 81 S.Ct. at 860 (quoting *Kotch v. Board of River Port Pilot Com'rs*, 330 U.S. 552, 556, 67 S.Ct. 910, 912, 91 L.Ed. 1093 (1947)).

sions are uncited. *Blum v. Yaretsky* [38] described itself as "obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment." [39] Moreover, the action taken failed on the first *Lugar* element, here conceded, there being no suggestion that the nursing home's decisions "were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care." [40] *Evans v. Abney*,[41] also cited by the majority, did not decide a state action question at all, but found that the state had exhibited no racially discriminatory motivation in nullifying a racially discriminatory trust and thereby removing from public use a park that under the trust could be enjoyed only by whites.[42]

B.

Our "necessarily fact-bound inquiry" [43] cannot be accomplished by attempting to cast a single state actor of undisputed stature. The majority considers and rejects in turn the candidacies of the trial judge and the private defendant's trial attorney. It rejects "[t]he merely ministerial function exercised by the judge in simply permitting the venire members cut by counsel to depart [as] an action so minimal in nature that one of less significance can scarcely be imagined." [44] As for the defense counsel, the majority reasons that if *Polk County v. Dodson* [45]

[38] 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982).

[39] 457 U.S. at 1003, 102 S.Ct. at 2785 (citing cases).

[40] 457 U.S. at 1005, 102 S.Ct. at 2786.

[41] 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970).

[42] 396 U.S. at 445, 90 S.Ct. at 633-34.

[43] *Lugar*, 457 U.S. at 939, 102 S.Ct. at 2755.

[44] Majority slip opinion at 2462, at ——.

[45] 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

decided that a public defender was not a state actor, surely a private defender cannot be.

That a public defender does not, merely by virtue of his employment relationship with the state, act throughout the trial under color of state law, does not mean that the litigant or his lawyer may not, in a specific instance during trial, become a state actor. The rationale of *Polk County* was that "[e]xcept for the source of [the counsel's] payment," the relationship between the indigent defendant and the public defender was "identical to that existing between any other lawyer and client." [46] The public defender is entitled to professional independence and the same freedom of professional judgment as a privately retained lawyer.[47] It does not follow, as the majority assumes, that the public defender or a privately retained lawyer is never a state actor. Indeed, *Polk County* never considered the issue of state action; [48] to the extent that state action would have been lacking, as the *Lugar* Court suggested, it was because the "respondent failed to challenge any rule of conduct or decision for which the State was responsible," [49] a near-verbatim recitation of *Lugar*'s first, here conceded, element.[50]

Examination of *Polk County* suggests instead the importance of considering the challenged conduct in depth, taking into account all its actors in the context in which they act, and avoiding conclusions driven by the characterization of particular players. The exercise of peremptory challenges is not an isolated event but part of an extensive statutory process applicable alike to civil and crim-

[46] 454 U.S. at 318, 102 S.Ct. at 449.

[47] 454 U.S. at 321-22, 102 S.Ct. at 451-52.

[48] *See* 454 U.S. at 322 n. 12, 102 S.Ct. at 451-52 n. 12.

[49] *Lugar*, 457 U.S. at 935 n. 18, 102 S.Ct. at 2752-53 n. 18.

[50] 457 U.S. at 937, 102 S.Ct. at 2753.

in cases triable by jury. "It is the policy of the United States," Congress has declared, "that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service. . . ." [51] To that end, "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status." [52]

Such provisions are not merely hortatory, but represent part of an active federal scheme to eliminate the discrimination that plagued the key-man system. In order to avoid discrimination in the selection of jury venires each district court must have a plan for random jury selection.[53] Congress has prescribed in some detail the contents of the plan,[54] the preparation of a master juror wheel and the completion of juror qualification forms,[55] the determination of the qualifications for jury service,[56] and the method of selecting and summoning jury panels.[57] When the case is set for trial, potential jurors are summoned by a federal officer, the Clerk of the United States District Court, to report to the United States courthouse. They are paid a per diem fixed by statute for their service, whether selected for a jury or not, becoming at least in some sense public servants

[51] 28 U.S.C. § 1861.

[52] 28 U.S.C. § 1862.

[53] 28 U.S.C. § 1863.

[54] *Ibid.*

[55] 28 U.S.C. § 1864.

[56] 28 U.S.C. § 1865.

[57] 28 U.S.C. § 1866.

charged with important responsibilities.[58] At an appropriate time they are questioned in voir dire by a federal judge and, depending on local practice, by counsel, concerning their qualifications to sit as a juror.

The number of peremptory challenges is determined in the main by statute. In civil cases, each party is provided by statute with three peremptory challenges,[59] while in criminal cases the number varies with the charge: if the offense is capital, 20 per side; if punishable by imprisonment for more than one year, six for the government and 10 for the defendant; and if the offense is punishable less severely, three per side.[60] Nevertheless, the judge may affect every aspect of the exercise of peremptory challenges. Most plainly, the judge has broad discretion in determining the appropriate number and allocation of peremptory challenges in all multiparty cases,[61] and may even limit ten criminal codefendants to a total of ten peremptory challenges.[62]

Less directly, courts determine the impact of any given number of peremptory strikes. Local court rules control the number of jurors eventually impanelled in civil cases,[63] thereby governing the relative effectiveness

[58] Alschuler, *supra*, at 197.

[59] 28 U.S.C. § 1870.

[60] Fed.R.Crim.P. 24(b).

[61] *See* 28 U.S.C. § 1870; Fed.R.Cr.P. 24(b).

[62] *See Gradsky v. United States*, 342 F.2d 147, 152-53 (5th Cir. 1965), *vacated on other grounds sub nom. Levine v. United States*, 383 U.S. 265, 86 S.Ct. 925, 15 L.Ed.2d 737 (1966); *see also Moore v. South African Marine Corp., Ltd.*, 469 F.2d 280, 281 (5th Cir. 1972); *Carey v. Lykes Bros. Steamship Co.*, 455 F.2d 1192, 1194 (5th Cir.1972); *United States v. Williams*, 447 F.2d 894, 896-97 (5th Cir.1971); *Nehring v. Empresa Lineas Maritimas Argentinas*, 401 F.2d 767, 767-68 (5th Cir.1968), *cert. denied*, 396 U.S. 819, 90 S.Ct. 55, 24 L.Ed.2d 69 (1969).

[63] *See Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973).

of peremptory challenges in determining the composition of the jury. Individual judges control the conduct of voir dire and the information that may be discovered about the venire,[64] thus affecting the exercise of both peremptory challenges and challenges for cause. Of course, by virtue of the trial judge's broad discretion over the exercise of challenges for cause,[65] he may determine the number of jurors who remain eligible for the exercise of peremptory strikes,[66] the court's own strikes,[67] or for eventual impaneling; the Supreme Court has acknowledged that a state may go so far as to require that parties use their peremptory challenges to cure erroneous refusals by the trial court to excuse potential jurors for cause.[68]

The majority's view of the court's "purely ministerial role" in supervising peremptory challenges is perhaps most strikingly belied in the trial judge's broad discretion to determine the manner in which peremptory challenges are exercised: he may decide which side exercises the last challenge,[69] may require simultaneous exercise of challenges by the prosecution and defense,[70] and may even require that one party exercise her challenges first, thereby allowing the other party to then act with full knowledge of her opponent's choices.[71]

[64] *See Rosales-Lopez v. United States*, 451 U.S. 182, 188-89, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981).

[65] *See United States v. Jones*, 712 F.2d 115, 121 (5th Cir.1983).

[66] *See United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir.1976); *but see United States v. Garza*, 574 F.2d 298, 302-03 (5th Cir.1978); *Stewart v. Texas & Pacific Rwy. Co.*, 278 F.2d 676, 677-78 (5th Cir.1960).

[67] *See United States v. Calhoun*, 542 F.2d 1094, 1103 (9th Cir. 1976) (citing *United States v. Bailey*, 468 F.2d 652, 658, *aff'd on other grounds*, 480 F.2d 518 (5th Cir.1973) (en banc)), *cert. denied*, 429 U.S. 1064, 97 S.Ct. 792, 50 L.Ed.2d 781 (1977).

[68] *See Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 2279, 101 L.Ed.2d 80 (1988).

[69] *See United States v. Durham*, 587 F.2d 799, 801 (5th Cir.1979).

[70] *See United States v. Sarris*, 632 F.2d 1341, 1343 (5th Cir. Unit A 1980).

Peremptory challenges are not self-executing but are effected by the action of the judge who excuses the prospective juror. The court, and hence, "the State[,] is not merely an observer of the discrimination, but a significant participant. . . . The only thing the State does not do is make the decision to discriminate. Everything else is done or supplied by the State," [72] a New York state judge has observed. By presiding over jury selection in his official, governmental capacity, a judge is intimately involved in the process that Tocqueville termed America's "greatest advantage" in "rub[bing] off th[e] private selfishness which is the rust of society." [73] By carrying out his duties in a way that permits peremptory challenges based on race, the rust of the judge's approval of discrimination rubs off onto society, corroding the national character by giving private prejudice the imprimatur of state approval. Thus the private litigant employing peremptory challenges on the basis of race has "acted together with or obtained significant aid from state officials" [74] in a manner sufficient to meet the second part of the *Lugar* test. "A state should not be permitted to delegate the power to determine the composition of official tribunals and then disclaim responsibility for the predictably discriminatory way in which this authority is exercised." [75] On its face, it is discriminatory state action for

[71] *See Gafford v. Star Fish & Oyster Co.*, 475 F.2d 767, 767-68 (5th Cir.1973).

[72] *People v. Gary M*, 138 Misc.2d 1081, 526 N.Y.S.2d 986, 994 (1988).

[73] 1 A. Tocqueville, Democracy in America 295-96 (Vintage Books ed. 1945).

[74] *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2754.

[75] Alschuler, *supra*, at 197.

the government itself to establish and maintain a system of jury selection that authorizes blatant racial discrimination by litigants using the courts set up by, paid for, and operated by the government.

III.

There are manifest differences between a criminal prosecution and a civil action and the degree of governmental involvement in each. In a criminal prosecution, the government, state or federal, initiates the proceeding against an unwilling defendant. The government prosecutes, and the full weight of the state's panoply of personnel and resources is brought to bear against the accused. In a civil matter to which the state is not a party, the plaintiff initiates the proceeding and private parties are matched against each other.

Neither the equal protection clause nor the rationale of the *Batson* case, however, is limited to the state's involvement in criminal prosecutions. The principle of equal protection applies to governmental action in civil as well as criminal matters,[76] federal as well as state.[77] While the Supreme Court in *Batson* considered only a defendant in a criminal case, its guiding precept was that a " 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.' " [78] Referring to its contemporary appraisal of the Fourteenth

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[76] *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886).

[77] *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

[78] *Batson*, 476 U.S. at 84, 106 S.Ct. at 1716 (quoting *Swain v. Alabama*, 380 U.S. 202, 203-204, 85 S.Ct. 824, 826-27, 13 L.Ed.2d 759 (1965)); *see also* 476 U.S. at 84 n. 3, 106 S.Ct. at 1716 n. 3 (citing cases).

Amendment in *Strauder v. West Virginia*,[79] the Court endorsed the explanation that "the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race." [80]

A.

The fundaments upon which *Batson* rests discourage any suggestion that its development is rooted solely on the criminal context. *Strauder* determined that a black defendant had been denied the equal protection of West Virginia's laws when he was criminally convicted by a jury from which members of his race had been purposefully excluded. The exclusion of blacks from the jury was not the result of circumstances peculiar to his trial, his prosecutors, or the nature of his offense, but followed from a West Virginia statute limiting eligibility for service on all grand and petit juries to white males.[81] The Court observed that the words of the Fourteenth Amendment:

> contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[82]

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[79] 100 U.S. (10 Otto) 303, 25 L.Ed. 664 (1880).

[80] 476 U.S. at 85, 106 S.Ct. at 1716; *see also Holland v. Illinois*, 108 S.Ct. 803, 810-11 ("the systematic exclusion of blacks from the jury system through peremptory challenges" is "obviously" unlawful).

[81] 100 U.S. (10 Otto) at 305.

[82] 100 U.S. (10 Otto) at 307-08.

It found the racial discrimination required by West Virginia to contradict "[t]he very idea of a jury," [83] obstructed the operation of an amendment designed "to strike down all possible legal discriminations" against blacks,[84] and held that such a law must yield to the federal statute permitting removal of civil suits and criminal prosecutions against persons denied their civil rights.[85]

The *Swain* Court surveyed the exercise of the Alabama struck-jury system in both the civil and criminal contexts, comparing it to the use of the peremptory challenge in the same aspects of other state systems.[86] After rejecting the argument that the Constitution "require[d] an examination of the prosecutor's reasons for the exercise of his challenges in any given case," [87] the Court considered Swain's broader claim that "there has never been a Negro on a petit jury in either a civil or criminal case in Talladega County" and that in criminal cases prosecutors had used their peremptory strikes to prevent blacks on the jury venire from sitting on the petit jury.[88] The Court concluded that although such a systematic practice would present a prima facie case under the Fourteenth Amendment,[89] Swain had failed to adequately allege the prosecutor's culpability in the complete absence of any blacks from the county's petit jurors, in part because he had failed to account for the participation of defense counsel in the result.[90]

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[83] 100 U.S. (10 Otto) at 308; *see also Holland v. Illinois*, 108 S.Ct. at 806-07 (citing *Strauder*); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946).

[84] 100 U.S. (10 Otto) at 310.

[85] 100 U.S. (10 Otto) at 311-12.

[86] 380 U.S. at 205-10, 217-18, 85 S.Ct. at 827-30, 834-35.

[87] 380 U.S. at 222, 86 S.Ct. at 837.

[88] 380 U.S. at 223, 85 S.Ct. at 837.

[89] 380 U.S. at 224, 85 S.Ct. at 838.

[90] 380 U.S. at 224-227, 86 S.Ct. at 838-39.

Swain's ambit was necessarily confined to the patterns and practices of prosecutors, and its standard of proof could not easily be extended to contemplate the constitutionally violative use of peremptory challenges by less frequent participants in the jury system, such as defense attorneys or counsel for civil plaintiffs. At the same time, it contemplated the inspection and discouragement of discriminatory practices in both civil and criminal employments of the jury venire.[91] *Batson*, by establishing a standard of proof that allows case-by-case inspection of the use of peremptory challenges, simultaneously commands full adoption of the promise of equal protection in every use of the venire. The universality of *Batson* was evident not only in its invocation of the equal protection clause, but also in its reliance, echoing *Swain*, on systems of proof founded primarily in the civil context.[92]

The judgment in *Batson* is but a continuation of the effort the Supreme Court began almost a century ago to eradicate the vice of racial discrimination in jury selection, extending the principles it had applied in *Strauder* and in *Swain*. As *Batson* spoke of *Strauder*, "[t]hat decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." [93] While the history of peremptory challenges may have begun before the Battle of Hastings, the federal governmental interest in eradicating racial discrimination began only after Appomatox, and the salutary effect of the equal protection clause did not end with *Batson* in 1986. As *Holland v. Illinois* [94] most recently emphasized, the Fourteenth Amendment contains

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[91] *See King v. County of Nassau*, 581 F.Supp. 493, 499-500 (E.D.N.Y.1984); *see also Clark v. City of Bridgeport*, 645 F.Supp. 890, 895 (D.Conn.1986) (citing *Swain* and *King*).

[92] *Cf. Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990).

[93] 476 U.S. at 85, 106 S.Ct. at 1716.

[94] —— U.S. ——, 110 S.Ct. 803, —— L.Ed.2d —— (1990).

an "intransigent prohibition of racial discrimination" applicable to all aspects of the jury system.[95] We must not now retreat.

B.

The only other circuits confronting the question of *Batson*'s application to civil cases have held that it applies with equal force in that context.[96] The Eleventh Circuit, in *Fludd v. Dykes*,[97] held that "the policies underlying the Supreme Court's decision in *Batson* are equally applicable in the civil context," explaining that the wrong done to an individual litigant's constitutional rights and the minimal burden imposed by *Batson* were no different in the civil setting.[98] Reaching the same result the Eighth Circuit in *Reynolds v. City of Little Rock*,[99] noted that "the Equal Protection Clause of the Fourteenth Amendment does not contain any latent distinction between criminal and civil legal process," [100] and that "[t]he more natural reading of *Batson* is that its rule of non-discrimination applies . . . without distinguishing criminal and civil legal proceedings." [101]

The concerns undergirding the *Batson* holding that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth

[95] *Ibid.*

[96] The Fourth, Sixth, and Seventh Circuits have declined to resolve the issue. *See Nowlin v. General Tel. Co. of the Southeast, S.C., Lake City Dist.*, 892 F.2d 1041 (4th Cir.1989) (unpublished opinion); *Robinson v. Quick*, 875 F.2d 867 (6th Cir.1989) (unpublished opinion); *Boykin v. Hamilton County Bd. of Educ.*, 869 F.2d 1488 (6th Cir. 1989) (unpublished opinion); *Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir.1988).

[97] 863 F.2d 822 (11th Cir.1989).

[98] *Id.* at 828-29.

[99] 893 F.2d 1004.

[100] *Ibid.*

[101] *Ibid.*

Amendment was designed to cure" [102] apply to civil no less than criminal proceedings. The *Batson* opinion itself provides the explanation: "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try,"[103] and, we add, the private litigant whose dispute they are called to adjudicate, but also insults the challenged venireperson. "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. A person's race simply 'is unrelated to his fitness as a juror'. . . . The harm from discriminatory jury selection, indeed, extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." [104]

Peremptory challenges occupy as important a position in the trial of civil cases as they do in criminal cases, and denying the application of *Batson* in the civil setting would erect an unconstitutionally adventitious division on the operations of jury trial procedure. The same member of the community called for jury service who would enjoy protection against racial discrimination if she were assigned to a criminal venire would be subject to the exercise of a blatantly discriminatory strike if she is first asked to fulfill her duty as a civil venireperson.[105] The same Assistant United States Attorney or State District Attorney forbidden by *Batson* from infringing on the rights of a criminal defendant or a venire member called

[102] 476 U.S. at 85, 106 S.Ct. at 1716.

[103] 476 U.S. at 87, 106 S.Ct. at 1718.

[104] *Ibid.* (citations and portions of text omitted); *see also* 28 U.S.C. § 1862.

[105] *Cf.* 28 U.S.C. § 1866(c), (e), (f).

to try him would infringe on the apparently contentless rights of civil defendant and a civil venire member.[106]

Racial prejudice has no more place in the federal courtroom on the days the court is conducting a civil trial than it does on the days when the same judge, seated at the same bench, in the same courtroom, before the same American flag, is conducting a criminal trial.[107] As the Supreme Court remarked in a related context,

> It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race . . .[108]

For the majority, however, there remains something ineffably different about civil proceedings, a difference apparently material to the racially discriminatory exercise of peremptory strikes; "fundamentally, the entire purpose of a criminal prosecution is to enforce the purposes of the state, whereas the state has no purpose at all in civil litigation beyond preempting the use of private force to settle disputes—a purpose that is as well served, if the parties consent, by an arbitration to which the state is no party."[109] Leaving aside for the moment those civil cases to which the government is a party,[110] and differentiating the issue of state action, the majority's assess-

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[106] *See* 28 U.S.C. § 547.

[107] *See Maloney v. Washington*, 690 F.Supp. 687 (N.D.Ill.1988) (memorandum opinion), *vacated on other grounds, Maloney v. Plunkett*, 854 F.2d 152 (7th Cir.1988).

[108] *Burton v. Wilmington Parking Authority*, 365 U.S. at 724, 81 S.Ct. at 861.

[109] Majority slip opinion at 2464, at ——— - ———.

[110] *See infra* notes 118-20 and accompanying text.

ment ignores the myriad ways in which the state and society evince a genuinely *civil*, civic, and non-privatistic interest in civil litigation. The Seventh Amendment preserves the right of trial by jury in suits at common law in which the value in controversy exceeds twenty dollars, thus interposing the civil jury as an important constraint on the power of government.[111] Such civil jury cases are administered by the government and conscript citizens to serve as jurors; last year federal district courts tried more civil jury cases than criminal jury cases.[112] Nor does the nominal identification of the parties do justice to the nature of the dispute: The United States, for example, not infrequently participates in civil suits as an *amicus curiae*,[113] and private persons are authorized by Congress to act on behalf of themselves and the United States as "private attorneys general" and *qui tam* plaintiffs.[114] Congress has also authorized private claimants to seek redress for injuries otherwise compensable in common law to promote the public interests embodied in statutes such as the Clayton Antitrust Act[115] and Title VII of the Civil Rights Act of 1964.[116] In federal courts, at least, the only major category of cases in which federal governmental interest is minor is diversity, and in those the

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[111] *See* Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn.L.Rev. 639, 644, 708-10 (1973); Note, The Civil Implications of *Batson v. Kentucky* and *State v. Gilmore:* A Further Look at Limitations on the Peremptory Challenge, 40 Rutgers L.Rev. 891, 946-48 (1988).

[112] Report of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts table C7 at 225 (1988).

[113] *See, e.g.*, Sup.Ct.R. 36.

[114] *See* Caminker, The Constitutionality of *Qui Tam* Actions, 99 Yale L.J. 341, 342-44 (1989).

[115] 15 U.S.C. §§ 15, 26.

[116] 42 U.S.C. § 2000e-5. *See generally* Stewart & Sunstein, Public Programs and Private Rights, 95 Harv.L.Rev. 1195 (1982).

Constitution itself requires that the federal judiciary provide a forum that is not only neutral but equally protective of individual rights.[117]

C.

Although the majority finds "no occasion to consider the situation presented where the state appears as a civil litigant," [118] such an occasion will necessarily disturb its intended limitation of *Batson* to the criminal context. When government is a litigant, it becomes clear that "[t]he distinction that is crucial for application of equal-protection principles is that between governmental actors and private actors." [119] Pursuing the criminal-civil distinction under such circumstances would seemingly license the state's discriminatory exercise of peremptory challenges in a manner "[]related to the outcome of the particular [civil] case on trial" [120] if it chose to seek civil sanctions rather than criminal against a particular defendant. The Fourteenth Amendment (and, for that matter, the Eighth) does not admit of such a subtle understanding of civil rights. Once such a case is considered, the criminal-civil distinction collapses, leaving only the examination of state involvement in those cases to which the government is not a party, such as the present one. The "slippery slope" that concerns the majority,[121] whether the product of *Batson*'s extension to other protected groups or its extension to civil jury trials, must simply be considered a necessary product of the scope of the equal protection clause, and cannot be used to suggest a limit to its dictates or a retreat from the logic of *Batson*.

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[117] U.S. Const. art. III, § 2, cl. 1.

[118] Majority slip opinion at 2463 n. 10, at —— n. 10.

[119] *Reynolds v. City of Little Rock; see also Fludd*, 863 F.2d at 828-29; *Clark*, 645 F.Supp. at 894-96.

[120] *Swain*, 380 U.S. at 224, 85 S.Ct. at 838.

[121] Majority slip opinion at 2461-2462, at ——-—— n. 6.

IV.

The use of peremptory challenges solely on the basis of racial animus, that is, as a device to bar a citizen from trial by a jury of all of his peers, save those of a certain race, cannot be justified by its history, ancient or modern, or by its utility to lawyers in attempting to win lawsuits. Racial prejudice was sanctioned by both the original Constitution and the Bill of Rights. The enactment of the equal protection clause marked the beginning of a new era, an era in which it was to be hoped that the color of a person's skin would not affect his legal rights.

The requirement of state action is in large part intended to "require the courts to respect the limits of their own power as directed against state governments and private interests." [122] "The petit jury," in turn, "has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." [123] Edmondson's invocation of his constitutional rights compels us to acknowledge the scope of judicial culpability in administering the racially discriminatory exercise of peremptory strikes against what remains, at least if unblemished, a cherished bulwark against every misuse of authority. We must take another step toward the goal of eradicating racial prejudice by eliminating the shameful practice of permitting a federal statute to be employed in a trial in a federal courtroom as a weapon of discrimination. I regret that the majority cannot yet see that to permit a person to be rejected from a jury solely because of the color of his skin rejects the promise upon which this nation's independence was based and the guarantee that the Fourteenth Amendment provides: that all persons are created equal. In God's sight. In human right. And in regard to service on a federal jury.

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[122] *Lugar*, 457 U.S. at 936-37, 102 S.Ct. at 2753.

[123] *Batson*, 476 U.S. at 86, 106 S.Ct. at 1717 (citations omitted).

SUPREME COURT OF THE UNITED STATES

No. 89-7743

THADDEUS DONALD EDMONSON,
Petitioner

v.

LEESVILLE CONCRETE COMPANY, INC.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 1, 1990